SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Tenth Circuit	a	1
Caption (omitted in printing)	a	
Record from D. C. U. S., Northern District of Oklahoma	1	1
Complaint	1	1
Exhibit A—Oil and gas mining lease, July 20, 1942, between The Commissioners of the Land Office of the State of Oklahoma and Champlin Refining Company (tract No. 14)	14	13
Exhibit B—Oil and gas mining lease, July 20, 1942, between The Commissioners of the Land Office of the State of Oklahoma and Champlin Refining Company (tract No. 15)	20	19
Disclaimer of Champlin Refining Company, an Iowa corporation	22	21
Answer of Champlin Refining Company, a New Mexico corporation	22	21
Motion of State of Oklahoma, ex rel. Commissioners of the Land Office to intervene	23	22
Order granting State of Oklahoma ex rel. Commissioners of the Land Office leave to intervene	25	24
Intervening answer of State of Oklahoma ex rel. Commissioners of the Land Office	26	24

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—9145

Record from D. C. U. S., Northern District of Oklahoma—Continued	Original	Print
Amendment to answer of Champlin Refining Company	28	27
Amendment to intervening answer	29	28
Plaintiff's motion for summary judgment	30	29
Affidavit in support of motion for summary judgment	31	30
Exhibit A—Map and plat of Arkansas River wherein said river divides Osage and Pawnee counties, Oklahoma (by reference only)	33	31
Exhibit B—Map or plat showing tracts Nos. 14 and 15 leased by School Land Commission to Champlin Refining Company, showing Champlin No. 1, river bed well	35	32
Exhibit C—Opinion, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al. (by reference only)	37	33
Exhibit D—Order, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al., that findings of fact in the opinion be adopted as findings of fact by the court (by reference to page 135)	37	33
Affidavit in support of motion for summary judgment	37	33
Stipulation as to judgment	38	34
Order overruling motion for summary judgment	39	35
Plaintiff's requested findings of fact and conclusions of law	39	35
Stipulation as to introduction of evidence showing that Arkansas River is non-navigable, etc.	50	45
Stipulation re drilling operations of Champlin Refinfining Company, etc.	51	46
Exhibit A—Map or plat showing tracts Nos. 14 and 15 leased by School Land Commission to Champlin Refining Company, showing Champlin No. 1 river bed well (by reference to page 35)	52	47
Exhibit B—Photograph of Champlin Refining Company well and of portion of Arkansas River	53	48
Exhibit C—Certificate of Phil R. Hawkins, Chairman, Board of Administration, State of Kansas, re leased portion of bed of Arkansas River, etc.	55	49
Exhibit D—Certificate of Phil R. Hawkins, Chairman, Board of Administration, State of Kansas, re non-producing leases on Arkansas River bed, etc.	56	50

	Original	Print
Record from D. C. U. S., Northern District of Oklahoma—Continued		
Exhibits—Continued		
Exhibit E—Certificate of Phil R. Hawkins, Chairman, Board of Administration, State of Kansas, re non-producing leases on Arkansas River bed	61	54
Findings of fact and conclusions of law	65	57
Decree	75	67
Notice of appeal	76	68
Order extending time for docketing cause	77	68
Order as to original exhibits	78	69
Appellant's designation of record on appeal	79	70
Statement of points relied on	81	72
Transcript of proceedings on pre-trial conference	84	75
Transcript of trial proceedings	107	95
Plaintiff's Exhibits:		
A—Letters patent, October 9, 1893, to William Bayhylle	114	100
2—Letters patent, October 9, 1893, to Horace Field	116	102
3—Letters patent, November 24, 1906, to Ethel Lewis Barnes	118	103
4—Letters patent, June 10, 1907, to Anna Robedeaux	119	105
5—Letter, June 25, 1881, The Secretary of the Interior to the Commissioner of Indian Affairs	121	106
6—Deed, June 14, 1883, between Cherokee Nation and United States of America in trust for the Pawnee Tribe of Indians	122	107
Plat of Pawnee Grant	127	110
7—Deed, June 14, 1883, between Cherokee Nation and the United States of America in trust for the Otoe and Missouria Indians	129	111
Plat of Otoe and Missouria Grant	133	114
20—Treaty between United States of America and Cheyenne and Arapahoe Indians, October 28, 1867 (by reference only)	135	115
21—Plat showing tracts 14 and 15 leased by School Land Commission to Champlin Refining Company (by reference to page 35)	135	115
22—Opinion, case No. 75, Equity, United States District Court Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al. (by reference only)	135	115

	Original	Print
Record from D. C. U. S., Northern District of Oklahoma—Continued		
Plaintiff's Exhibits—Continued		
23—Order, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al., that findings of fact in the opinion be adopted as findings of fact by the court	135	115
24—Decree, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al.	136	116
Defendants' Exhibits:		
1—Treaty between United States of America and Western Cherokee Nation, May 6, 1828 (by reference only)	137	118
1A—Treaty between United States of America and Western Cherokee Nation, 1833 (by reference only)	137	118
1B—Treaty between United States of America and Western Cherokee Nation, 1835 (by reference only)	137	118
1C—Letters patent, December 31, 1838, to Cherokee Nation	138	118
2—Treaty, between United States of America and Cherokee Nation, July 19, 1866 (by reference only)	144	124
3—Act of April 10, 1876; 19 Stat. 28; Sec. 4, Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 160 (by reference only)	144	124
4—Act of March 3, 1881; 21 Stat. 380; Sec. 5, Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 190 (by reference only)	144	124
5—22 Statutes at Large, page 624, 47 Congress Session 11 Ch. 143, 1883 (by reference only)	144	124
5A—Pages 271 and 272, annual report of the Commissioner of Indian Affairs to the Secretary of the Interior for the year 1882	144	124
6—Deed, June 14, 1883, between Cherokee Nation and the United States of America in trust for the Otoe and Missouria Indians by reference to page 129)	148	127
7—Plat of survey of T. 23 N., R. 3 E. I. M., Oklahoma, 1872 (by reference only)	148	128
8—Plat of survey of T. 23 N., R. 3 E. I. M., Oklahoma, 1872 (by reference only)	148	128

	Original	Print
Record from D. C. U. S., Northern District of Oklahoma—Continued		
Defendants Exhibits—Continued		
9—Affidavit of Roy G. Collier	148	128
Computation of acreage	149	129
Plat of survey of T. 23 N., R. 3 E. E. I. M., Oklahoma, 1872 (by reference only)	154	134
9A—Affidavit of O. F. Sewell	154	134
Computation of acreage	155	135
Plat of survey of T. 23 N., R. 3 E. I. M., Oklahoma, 1872 (by reference to page 154)	154	134
10—Agreement between United States of America and the Pawnee Tribe of Indians (Kappler Indian Affairs, Laws and Treaties, Vol. 1, pages 496 to 498) (by reference only)	159	139
11—Act of March 3, 1893, 27 Stat. 557, Secs. 12-13 (Pawnee Indian lands) Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 496 (by reference only)	159	139
12—Articles of agreement, December 19, 1891, between United States of America and Cherokee Nation (Kappler Indian Affairs, Laws and Treaties, Vol. 1, pages 490 to 492) (by reference only)	159	139
13—Act of March 3, 1893, 20 Stat. 557, Sec. 10 (Cherokee outlet) Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 489 (by reference only)	159	139
14—Proclamation by the President of the United States, August 19, 1893, 28 Stat. 1222 (Kappler Indian Affairs, Laws and Treaties, Vol. 1, pages 967, 969 and 971) (by reference only)	159	139
15—Certificate of Phil R. Hawkins, Chairman, Board of Administration, State of Kansas, relative to bed of Arkansas River	159	139
Clerk's certificate (omitted in printing)	160	
Record entry: Cause argued and submitted	163	140
Opinion, Phillips, J.	163	141
Judgment	173	150
Petition for rehearing	177	151
Order denying petition for rehearing	193	161
Clerk's note re stay of mandate	193	161
Clerk's certificate (omitted in printing)	193	
Order allowing certiorari	195	161

[fol. a] [Caption omitted]

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 1044 Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHAMPLIN REFINING COMPANY, a Corporation; and CHAMPLIN REFINING Co., a Corporation, Defendants

STATE OF OKLAHOMA ex rel. COMMISSIONERS OF THE LAND OFFICE, Interveners

COMPLAINT—Filed July 13, 1943

Comes now the plaintiff, United States of America by Whit Y. Mauzy, United States Attorney, for the Northern District of Oklahoma, acting at the request of the Secretary of the Interior and by direction of the Attorney General of the United States and brings this action against the defendants above named, and for its cause of action against said defendants, alleges and states:

I

That the Champlin Refining Company is and was at the times hereinafter mentioned a foreign corporation, organized and existing in the State of Iowa, and operating pursuant to the laws of that state and duly licensed to operate in the State of Oklahoma with its principal place of business in Enid, Garfield County, Oklahoma.

That the Champlin Refining Co., is and was at all times hereinafter mentioned a foreign corporation, organized and existing in the State of New Mexico and operating pursuant to the laws of that state and licensed to operate in the State of Oklahoma with its principal place of business, in Enid, Garfield County, Oklahoma.

[fol. 2] II

That pursuant to certain treaties between the Cherokee Nation and the United States of America and pursuant to the authority granted by the Act of March 3rd, 1883 (22 Stat. L. 603-624), the Cherokee Nation for a valuable consideration by its duly authorized officials on the 14th day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Pawnee Tribe of Indians,

Townships 21, 22 and fractional Townships 23 and 24, North of Range 4 East of the Indian Meridian,

together with other lands not herein involved.

III

That pursuant to certain treaties between the Cherokee Nation and the United States of America, whereby certain lands were ceded to the United States by the Cherokee Nation for the Settlement of friendly Indians, the Secretary of the Interior on the 25th day of June 1881, designated and assigned for the use and occupation of the Confederated Otoe and Missouria Tribe of Indians,

that portion of Township 23, North of Range 3 East of the Indian Meridian, lying West of the Arkansas River,

together with other lands not herein involved.

IV

Pursuant to certain treaties between the Cherokee Nation and the United States of America and pursuant to the authority granted by the Act of March 3, 1883 (22 Stat. L. 603-624) the Cherokee Nation for a valuable consideration by its duly authorized officials on the 14th day of June, 1883 did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Otoe and Missouria Indians.

fractional Township 23, North of Range 3 East of the Indian Meridian,

[fol. 3] together with other lands not involved herein.

V

That by virtue of the Act of Congress of April 10, 1876 (19 Stat. L. 29) there was set apart for the use and occupation of the Pawnee Indians

Township 23, North of Range 4 East of the Indian Meridian, together with other lands and the provision made for the Secretary of the Interior to cause to be made to each head of a family or single person over twenty-one years of age belonging to said Pawnee Tribe of Indians and residing upon said reservation, who should so elect, an allotment within said reservation consisting of one hundred and sixty acres of land, and that the Certificates of allotment were to be issued by the Commissioner of Indian Affairs upon the approval of the Secretary of the Interior with the provision that patents were to be issued upon the allottee making certain improvements.

VI

That the Act of Congress of February 8, 1887 (24 Stat. L. 388) provided that whenever, in the opinion of the President of the United States, it was advantageous to the *Indian* for their reservation to be used for agricultural or grazing purposes, he could cause the same to be surveyed and make allotments in severalty to such Indians. Said Act further provided that upon the allotments being approved by the Secretary of the Interior patents were to issue in the name of the allottees, but were to provide that the United States hold the land allotted for a period of twenty-five years in trust for the sole use and benefit of the Indian to whom the allotment was made, or in case of his death to his heirs, and at the expiration of said period, the United States was to convey said land by patent to said Indian so discharged of the trust and free of all incumbrances. Said Act further provided that the President could, in his discretion, extend the trust period.

VII

That under and by virtue of the authority granted in Section 5 of the Act of February 8, 1887 (24 Stat. L. 388) [fol. 4] by executive orders of the different Presidents, the trust provisions have been extended to all lands allotted and as to all allottees and their heirs hereinafter referred to and involved herein. That all lands hereinafter described are and have been allotted to the respective allottees in the

manner as provided by law and are at this time and have been since the allotments were made, held in trust by the United States of America for the sole use and benefit of the respective allottees and the heirs of the deceased allottees.

VIII

That on the 9th day of October, 1893 a trust patent was issued as provided by law to Horace Fields, an Indian of the Pawnee Tribe, being allottee No. 28, to the following described real estate, to-wit:

The Southeast Quarter of the Northwest Quarter and the Lots numbered one, two and three of Section Nineteen, in Township Twenty-three, North of Range Four East of the Indian Meridian, in Oklahoma Territory containing one hundred twenty-one acres and sixty-six hundredths of an acre.

That thereafter the allottee, Horace Fields died, his heirs being determined by the Department of the Interior and found to be his wife, Eva R. Weeks and his son, Arthur Fields, each of whom took a one-half interest in and to said allotment. That thereafter by deed duly approved by the Department of the Interior on June 13th, 1922, Eva R. Weeks, conveyed a one-fourth interest in the allotment of Horace Fields to Arthur Fields. That Eva R. Weeks thereafter died leaving as her heirs as found and determined to be so by the Department of the Interior,

Anna Barker, Johnie Davis, Lena Brown, and Arthur Fields,

each of whom received a one-fourth interest in the estate of Eva R. Weeks. That the title to the real estate above described is now held in trust and was so held on the 20th day of July, 1942, and prior thereto by the United States of America for the following heirs, in the proportionate interests set opposite their names, as follows:

[fol. 5]

Arthur Fields	13/16ths
Anna Barker	1/16th
Jennie Davis	1/16th
Lena Brown	1/16th

IX

That on the 9th day of October, 1893, a trust patent was issued as provided by law to William Bayhylle, an Indian of the Pawnee Tribe, being allottee No. 302, to the following described real estate, to-wit:

The West Half of the Northeast Quarter of Section Twenty, and the Southwest Quarter of the Southeast Quarter, and Lot numbered Six of Section Seventeen, in Township Twenty-three, North of Range Four East of the Indian Meridian, Oklahoma Territory, containing one hundred twenty-nine acres.

That the said William Bayhylle died on or about the 26th day of April, 1911, leaving as heirs, who were determined and found by the Department of the Interior to be and their interests as follows:

Kittie Bayhylle, wife	7/21sts,
Edward Bayhylle, son	2/21sts,
Daniel Bayhylle, son	2/21sts,
Elijah Bayhylle, son	2/21sts,
Violet Rappuis, daughter	2/21sts,
William Bayhylle, Jr., son	2/21sts,
Louis Bayhylle, son	2/21sts,
Elmer Bayhylle, son	2/21sts.

That thereafter Elijah Bayhylle died and it was determined and found by the Department of the Interior that his mother, Kittie Bayhylle, was his sole and only heir, whereupon she took the entire estate of Elijah Bayhylle. That thereafter, on or about the 18th day of August, 1940, Kittie Bayhylle died, her heirs being determined by the Department of the Interior and found to be and their interests as follows:

[fol. 6]

Daniel Bayhylle, son	2/12ths,
Violet Bayhylle, daughter	2/12ths,
William R. Bayhylle, son	2/12ths,
Louis D. Bayhylle, son	2/12ths,
Elmer Bayhylle, son	2/12ths,
Perry W. Moore, grandson	1/12th,
Lucille M. Moore, grand-daughter	1/12th.

That the title to the real estate above described allotted to William Bayhylle, of which only

Lot Six and the Southwest Quarter of the Southeast Quarter of Section Seventeen, Township Twenty-three North of Range Four East of the Indian Meridian

is herein involved, is now held in trust by the United States of America for the following heirs and their respective interests in the estate of William Bayhylle set opposite their names, is as follows:

Edward Bayhylle	3/84ths,
Daniel Bayhylle	14/84ths,
Violet Bayhylle	14/84ths,
William R. Bayhylle	14/84ths,
Louis D. Bayhylle	14/84ths,
Elmer Bayhylle	14/84ths,
Perry W. Moore	3/84ths,
Lucille M. Moore	3/84ths.

X

That on the 24th day of November, 1906, a trust patent was issued as provided by law to Ethel Lewis Barnes, an Indian of the Otoe Tribe, being allottee No. 454, to the following described real estate, to-wit:

The South Half of the Southeast Quarter and the Northeast Quarter of the Southeast Quarter and the Lot numbered Five of Section Twenty-four, in Township Twenty-three, North of Range Three East of the Indian Meridian, in Oklahoma, containing One Hundred fifty-two acres and twenty-hundredths of an acre

That the title to the above described real estate so allotted to Ethel Lewis Barnes of which only

[fol. 7] Lot Five of Section Twenty-four, Township Twenty-three, North of Range Three East of the Indian Meridian in Oklahoma

is involved herein is now held in trust by the United States of America for the said allottee Ethel Lewis Barnes.

XI

That on the 10th day of June, 1907, a trust patent was issued as provided by law, to Anne Robedeaux an Otoe In-

dian, being allottee number 409-A to the following described real estate, to-wit:

The West Half of the Southeast Quarter and the Southeast Quarter of the Southeast Quarter of Section One, and the Southwest Quarter of the Northeast Quarter of Section Thirteen in Township Twenty-two North of Range One East, Lot numbered Six of Section Twenty-four in Township Twenty-three North of Range Three, East of the Indian Meridian in Oklahoma, and containing Two hundred five acres and forty-five hundredths of an acre.

That the said Anna Robedeaux died on or about June 4th, 1933, her heirs being determined and the Department of the Interior found them to be

Belle Robedeaux, Pearl Robedeaux, Mary Robedeaux, Naomi Robedeaux,

and each of whom received a one-fourth interest in and to the above described real estate allotted to the said Anna Robedeaux. That thereafter Belle Robedeaux died leaving as her heirs, so determined and found to be by the Department of the Interior,

William Burgess, Dewey W. Daily, Esther Burgess, Earl Burgess, Lucy Burgess, Annie Burgess, Curtis F. Burgess, each of whom inherited a one-seventh interest in and to the estate of Belle Robedeaux. That the title to the real estate above described allotted to Anna Robedeaux of which only

Lot Six of Section Twenty-four, Township Twenty-three, North of Range Three East of the Indian Meridian, in Oklahoma

[fol. 8] is herein involved, is now held in trust by the United States of America for the following heirs of Anna Robedeaux and their respective interests in the estate set opposite their names, is as follows:

Pearl Robedeaux	9/36ths,
Mary Robedeaux	9/36ths,
Naomi Robedeaux	9/36ths,
William Burgess	3/36ths,
Dewey W. Daily	1/36th,
Esther Burgess	1/36th,
Earl Burgess	1/36th,

Lucy Burgess 1/36th,
Annie Burgess 1/36th,
Curtis F. Burgess ..... 1/36th.

XII

That under the lands above described being herein involved and which are held in trust by the United States of America for the respective allottees and the heirs of the deceased allottees, valuable deposits of minerals, to-wit, oil and gas exist. That a proven oil field has been discovered and is being developed in the immediate vicinity of the real estate herein involved.

XIII

That on or about the 20th day of July, 1942, the Commissioners of the Land Office of the State of Oklahoma purporting to act under and in pursuance of the authority of the State of Oklahoma, but without the authority and consent of the above named allottees or the heirs of the deceased allottees and without the consent or approval of the Secretary of the Interior executed to and in favor of the Champlin Refining Company, Enid, Oklahoma, an instrument in writing purporting to be an oil and gas lease upon the lands therein described as follows, to-wit:

Beginning at the Northeast (NE) corner of Lot 5 of Sec. 17-23N-4E, thence North along the projection of the East Boundary of said Lot 5 to the Southern boundary of the Osage Nation, being the center line of the main channel of the Arkansas River, thence Westerly along the said center [fol. 9] line of the main channel of the Arkansas River to a point where the said center line intersects the projection of the West Boundary line of Sec. 19-23N-4E, thence South along the projection of said Western boundary line of Sec. 19-23N-4E, to the Northwest (NW) corner of Lot 2 of said Sec. 19-23N-4E, thence Easterly along the Northern boundaries of Lots 2 and 1 of Sec. 19, Lots 9 and 6 of Sec. 18, Lots 8, 7, 6 and 5 of Sec. 17, all in 23N-4E, as said lots are shown on the recorded Government Plat thereof, to point of beginning.

It is being the intention hereof to lease all of the bed of the Arkansas River lying South of the Southern Boundary of the Osage Nation, being the center line of the main chan-

nel of the said river in Section 17, 18, 19, in Township 23 North, Range 4 East, and containing 157 Acres, more or less.

A copy of said instrument of writing is hereto attached and made a part hereof and marked "Exhibit A".

XIV

That on or about the 20th day of July, 1942, the Commissioners of the Land Office of the State of Oklahoma purporting to act under and in pursuance of the authority of the State of Oklahoma, but without the authority and consent of the above named allottees of the heirs of the deceased allottees and without the consent or approval of the Secretary of the Interior executed to and in favor of the Champlin Refining Company, Enid, Oklahoma, an instrument in writing purporting to be an oil and gas lease upon the lands therein described as follows, to-wit:

Beginning at the Northeast (NE) corner of Lot 5 of Sec-24-23N-3E, thence North along the projection of the Eastern Boundary of said Lot 5 to a point where the said projection intersects the Southern Boundary of the Osage Nation, being the center line of the main channel of the Arkansas River, thence Westerly along the main channel of the Arkansas River to a point where the said center line intersects the projection of the Western Boundary line of Sec. 15-23N-3E, thence South along the projection of the said boundary line of said Sec. 15-23N-3E to the Northwest (NW) corner of Lot 7 of Sec. 15-23N-3E, thence South along the West boundaries of Sections 15 and 22-23N-3E, to the [fol. 10] Southern Boundary of Lot 1 of Sec. 21-23N-3E, thence Southwesterly along the Southeastern Boundary of Lot 1, of Sec. 21-23N-3E, to the East Boundary line of the W/2 of NE/4 of Sec. 21-23N-3E, thence Southerly along the said East Boundary line of the W/2 of NE/4 of Sec. 21-23N-3E, to the Southern Boundary thereof, thence Southerly along the Eastern boundary of the NW/4 of SE/4 of Sec. 21-23N-3E, to the Northwest (NW) corner of Lot 4 of Sec. 21-23N-3E, thence Easterly along the Northern Boundaries of Lot 4 of Sec. 21, Lots 11, 12, 13 and 14 of Sec. 22, Lots 9, 8, 7, and 6 of Sec. 23, lots 8, 7, 6, and 5 of Sec. 24, all in 23N-3E to the point of beginning, excluding however, Lots 5-6 and 7 of Sec. 15, Lots 1, 2, 3, 4, 5, 7, 8, 9, and 10 of Sec. 22, Lot 3 of Sec. 21, Lots 10, 11 and 12 of Sec. 23, all in

23N-3E, as said Lots are shown on the recorded Government Plat thereof.

It being the intention hereof to lease all of the bed of the Arkansas River lying South of the Southern Boundary of the Osage Nation, being the center line of the main channel of the said river in Section 15, 21, 22, 23 and 24, in Township 23 North, Range 3 East, and containing 281 Acres, more or less.

A copy of said instrument of writing is hereto attached and made a part hereof and marked "Exhibit B".

XV

That both of the purported leases above mentioned were executed without the authority of the plaintiff herein or the allottees, or of the heirs of the deceased allottees of the lands herein involved and without the consent or approval of the Secretary of the Interior.

XVI

That the Arkansas River at the points herein involved was not a navigable stream within the purview of the laws of the United States at the time the State of Oklahoma was admitted to the Union. That the navigability of the Arkansas River at said time and at the points and places herein involved has been passed upon and determined in the case of United States v. Brewer-Elliott Oil and Gas Company 260 U. S. 77, wherein the Supreme Court of the United [fol. 11] States affirmed the decisions of the United States District Court for the Western District of Oklahoma and the Circuit Court of Appeals for this circuit in the finding that the Arkansas River was not navigable at the time Oklahoma was admitted to the Union.

XVII

That under and by virtue of the above mentioned leases, the defendants, or either or both of them are asserting certain rights, titles, claims and interests in and to the oil and gas in and under the bed of said Arkansas River and within the boundaries of the allotments heretofore described which are held in trust by the plaintiff for the benefit of the allottees and the heirs of the deceased allottees. That the defendants or either or both have threatened and are threat--ning to begin prospecting for oil and gas in said Arkansas

River bed and within the boundaries of the above described allotted lands, and if said threats are carried into execution it will be without the authority of the plaintiff or the allottees or heirs of the deceased allottees interested herein or the Secretary of the Interior.

XVIII

That the State of Oklahoma, as the plaintiff verily believes, has no proprietary title or interest in the bed of the Arkansas River and is wholly without power or authority to convey or confer by lease or otherwise any proprietary interest or title in such river bed and particularly in or to that portion of the bed of the Arkansas River which has been allotted to or adjoins the allotments heretofore described and involved herein and which the United States of America holds in trust for the benefit of said allottees and the heirs of the deceased allottees mentioned.

XIX

That the said defendants or either or both are trespassing and clouding the title to the portion of the land heretofore described and involved herein and threaten to continue to do so. That the instruments heretofore referred to and which are attached hereto and marked "Exhibit A and B" have been placed of public record in the office of the Secretary [fol. 12] of the Commissioner of the Land Office of the State of Oklahoma and constitute a cloud on the title of the United States of America and the allottees and heirs of the deceased allottees above set out, to that portion of the oil and gas minerals under the said Arkansas River bed belonging to said allottees, and the heirs of the deceased allottees and held in trust by the United States of America, and are depreciating the value thereof and are hindering the control and supervision of the United States over said minerals and the leasing thereof for the use and benefits of the Indian allottees and the heirs of the said deceased allottees. That the United States is under the governmental duty and obligation of protecting the Indians involved and their property rights in the premises and is charged with the proper and diligent exercise of its trust in behalf of said Indians and for the proper performance of its duty in the premises, it is necessary to seek relief from this Court to the ends that the defendants or either or both of them should not only be ousted from the possession of said lands and minerals, so

held in trust, but that the Court may order that said instruments of writing, copies of which are hereto attached as Exhibits "A" and "B" be surrendered for cancellation and cancelled and the records purged thereof and may forever enjoin the defendants from asserting any interest whatsoever in said lands and minerals adverse to the plaintiff and the allottees and the heirs of the deceased allottees herein involved.

Wherefore the plaintiff now prays that the defendants, Champlin Refining Company, a corporation of Iowa, duly authorized to and doing business in the State of Oklahoma, and the Champlin Refining Co., a corporation of New Mexico duly authorized to and doing business in the state of Oklahoma and either or both of them, which ever is herein involved and claims an interest under and by virtue of the purported leases heretofore referred to, the exact one being unknown to the plaintiff, be enjoined from committing a trespass or a continuous trespass upon said river bed and minerals thereunder belonging to the Indians involved and held in trust by the United States for their benefit as heretofore set out, or entering upon the same, or prospecting [fol. 13] for or mining or removing oil or gas therefrom. That the above described instruments of writing, copies of which are hereto attached and marked Exhibits "A" and "B" be ordered surrendered for cancellation and be cancelled and held null and void insofar as same purport to effect or cover or convey the said lands or river bed and minerals thereunder so held in trust by the United States for the allottees named and the heirs of the deceased allottees involved. That the defendants, or either of them, which ever asserts its claim, and all persons claiming by, through or under them, be forever enjoined from asserting any right, title or interest in or to said lands and the oil and gas and minerals thereunder adverse to plaintiff and the Indians herein named. That the title to said lands and minerals be quieted in the United States and said allottees and the heirs of the deceased allottees entitled thereto and that the defendants and each or both of them, which ever is involved, and their agents, employees, successors and assigns be enjoined from drilling or prospecting for oil and gas in said river bed within the limits of the lands herein involved now held in trust by the United States for the benefit of the above named Indians and that during the pendency of this action

and until the further order of the Court, the defendants and each of them, their agents, employees, successors and assigns, be restrained and enjoined from drilling or prospecting for oil and gas on said land as above described and that plaintiff have such other and further relief as it may be entitled to in the premises.

Whit Y. Mauzy, United States Attorney. Wm. Knight Powers, Assistant United States Attorney.

[File endorsement omitted.]

[fol. 14] EXHIBIT "A" TO COMPLAINT

The State of Oklahoma

Oil and Gas Mining Lease

Tract No. 14

This Indenture of Lease, Made and entered into duplicate, on the 20th day of July A. D., 1942, by and between The Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Champlin Refining Company, Enid, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Constitution and Laws of the State of Oklahoma, relating to the segregation of the oil and gas deposits and the leasing thereof on school and other public lands belonging to the State of Oklahoma, Witnesseth:

1. The lessor, for and in consideration of Three Hundred Fifty-four & No/100 ($354.00) Dollars, the receipt whereof is hereby acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained and hereby agreed to be paid, observed and performed by the lessee, and his lawful assigns:

[The description of the lands, which is set out at this point in the lease, is identical with the description set out in paragraph 13 of the complaint (page 8 this record.)]

does hereby demise, grant, lease and let unto the lessee for the term of five years from the date hereof, and as long there-

after as oil or gas or either of them is produced in paying quantities, all of the oil deposits and natural gas in or under the following described tract of land lying and being within the County of Pawnee, in the State of Oklahoma, to-wit:

Tract No. 14. That portion of the Bed of the Arkansas River in Pawnee County, Oklahoma as above described:

and containing 157 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry [fol. 15] on the work of prospecting for, extracting, piping, storing and removing such oil and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owners or lessee, and also the right to use, free of cost, oil and natural gas or fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to deliver or cause to be delivered to The Commissioners of the Land Office of the State of Oklahoma, or their successors, a royalty, of one-eighth part of the oil or gas produced from the leased premises or in lieu thereof, pay to the State the market value of said royalty interest, as the Commissioners may elect. All oil and gas due to the State under this contract, shall be delivered by the lessee herein, free of cost, into pipe lines, tanks or cars, or settled or paid for before removing same from the premises if handled in any other way. The lessee shall furnish to the lessor certified copies of gauge tickets, sales, shipments and amount of gross production, at their office in Oklahoma City. Gas to be metered on the premises under high pressure, unless some other method of gauging and metering same shall be hereafter agreed upon by the parties hereto in writing.

3. The lessee hereby agrees to deliver or cause to be delivered to the Commissioners of the Land Office, of said State, a royalty of one-eighth of all casinghead or drip, gas or gasoline, produced or extracted from any gas produced from any well on said premises, or in lieu thereof, pay the State the market value of said royalty interest as the Commissioners of the Land Office may elect. The term "casinghead gas" shall be construed to mean gas which is produced

from the same sand from which oil is produced, whether it be taken from flow tank or trap for the handling of flowing wells, or issued from the casinghead of an oil well equipped for pumping.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on the land covered by this lease, and shall drill a sufficient number of wells to offset the wells upon adjoining contiguous premises, said offset wells to be [fol. 16] commenced within ten days after completion of any producing well upon such adjoining contiguous premises unless a different time is prescribed by notice in writing from the lessor, and be prosecuted diligently and continuously until completed; and the said lessee shall operate the leased premises for oil and gas to the same extent as individual and corporate premises are being operated within the general oil and gas fields where such land is located, and failure to faithfully comply with this provision shall be cause for forfeiture of this lease to the State.

5. At least one well producing oil or gas in paying quantities shall be drilled and completed within one year from the date hereof, or failing so to do the lessee shall pay to the lessor for each whole year the completion of such a well is delayed, for not to exceed five years from the date hereof, in addition to the other consideration named herein, rental of One ($1.00) Dollar per acre, payable annually, in advance, and if the lessee shall fail to drill at least one such well within any such yearly period, and shall fail to surrender this lease on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken as conclusively evidencing the election and covenant of the lessee to pay the rental of One ($1.00) Dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen (15) days after it becomes due at the end of any yearly period during which a well has not been completed as herein provided, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation thereof, but such cancellation shall not in any wise operate to release or relieve the lessee from the convenants and obligations to pay such rental or any other accrued obligation. It being understood that the completion of one well producing oil or gas in paying quantities

during the life of this lease, shall relieve the lessee of all future liability for said $1.00 per acre hereunder, but the lessee shall nevertheless remain obligated to drill an offset, or necessary offsets, and other wells necessary to the proper development and operation of said lease as herein otherwise provided; and provided further that unless a producing well [fol. 17] of oil or gas is completed on the above described premises within five years from the date hereof this lease shall be void.

6. The lessee shall carry on the development and operation in a workmanlike manner; commit no waste on said land, and suffer none to be committed upon the portion in his occupancy or use; take good care of the same, and promptly surrender and return the premises upon the termination of this lease to the lessor, or to whomsoever shall be lawfully entitled thereto, unavoidable casualty only excepted.

7. All tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells, shall remain the property of the lessee, and may be removed at any time prior to or at the termination of the lease by forfeiture or otherwise; and the lessee shall not permit any nuisance to be maintained on the premises; and shall not use said premises for any purposes than those authorized in the lease; and before abandoning any well, shall securely plug the same so as to effectually shut off all water from the oil bearing stratum, or in the manner required by the laws of the State of Oklahoma.

8. The lessees shall keep an accurate account of all oil and gas mining operations, including a log of each well drilled, duly sworn to by the contractor or driller, which shall be filed with the Secretary to The Commissioners of the Land Office within thirty days after said well is completed. Accurate and reliable information concerning all wells and their operation and management shall be furnished to The Commissioners of the Land Office or their representatives upon demand. The said lessee shall also keep an accurate account showing the sales, prices, dates, purchases, and the whole amount of oil and gas mined or removed, and all sums due as royalties shall be a lien on the implements, tools and movable machinery or personal chattels used in operating said property, and also upon all the unsold oil

and gas obtained from the land herein leased as security for the payment of said royalties.

9. The lessee shall be liable to the surface owner or surface lessee for all damages or loss accruing to the surface [fol. 18] interests in said land, and to all crops and improvements, thereupon and appurtenances and hereditaments thereunto belonging by reason of the oil and gas mining operations hereunder, and in the event the amount of such damage cannot be agreed upon by the lessee hereof and such surface owner or lessee, then the amount of such damage shall be determined as is or may be provided by law. The lessee hereof further agrees to pay all such damages within ten days after the amount thereof is determined, and the amount of such damages may be recovered from the lessee hereof and his sureties upon the bond given to secure the faithful performance of this lease.

10. This lease shall be subject to the constitution and laws of the State of Oklahoma and the rules and regulations of The Commissioners of the Land Office now or hereafter in force relative to such leases; all of which are made a part and condition of this lease; Provided, That no regulations made after the execution of this lease affecting either the length of the term hereof, the rate of royalty, or payment hereunder or the assignment hereof, shall operate to affect the terms and conditions of this lease.

11. No transfer or assignment of this lease or any part thereof, shall be valid, or convey any right in the assignee without the consent in writing of The Commissioners of the Land Office; and such assignee shall furnish a bond to the satisfaction of The Commissioners of the Land Office, conditioned for the faithful performance of the covenants and conditions of this lease, and pay an assignment fee of Five Dollars.

12. Before this lease shall be in force and effect the lessee shall give a good and sufficient bond in the sum of One Thousand & No/00 ($1,000.00) Dollars, to be approved by the Commissioners of the Land Office, for the faithful performance of this lease.

13. Upon the violation of any of the substantial terms or conditions of this lease, The Commissioners of the Land

Office shall have the right at any time after hearing upon ten days notice, given by registered mail to the last known address of such lessee, or by posting notice in writing in a [fol. 19] conspicuous place upon the premises, specifying the terms or conditions violated, to declare this lease null and void; and the said Commissioners for and on behalf of the State of Oklahoma, shall be entitled to recover from the lessee's bondsmen, all rents, royalties, charges, claims of every kind and nature due and owing and accruing and arising out of and by reason of this lease, on failure to comply with the provisions thereof, and the lessors shall be entitled and authorized to take immediate possession of the land.

14. It is further agreed that for any refinery of crude oil and its products and bi-products, owned and controlled by the State of Oklahoma, the State shall have preference right to purchase and receive the output from said premises at the market price thereof: Provided; that this clause shall not prevent the lessee from selling the output of said leases to any person, firm or corporation whatsoever until notice in writing from The Commissioners of the Land Office shall be served on the lessee that the State is ready to take such oil and gas or either of them, and all sales of oil and gas or either of them under this proviso shall be valid and binding.

15. The lessee may at any time hereafter surrender and wholly terminate this lease upon payment of the rentals and other liabilities then accrued and due hereunder, and may exercise such right by filing a formal relinquishment and release of the said lease with the Secretary to The Commissioners of the Land Office; Provided, that if such lease has been recorded by causing the release thereof to be filed and recorded in the proper recording office, and upon a compliance with these requirements such lessee shall thereby be relieved from liability for rental thereafter accruing.

Lessor agrees that this lease or any portion or portions thereof may be consolidated and jointly operated with the lease or leases covering any adjoining property or properties to such extent and in drilling units of such size as may be required to obtain a permit to drill a well or wells upon the property covered by this lease or adjoining leases, under the terms of any Federal or State statute or any rule or regulation of any Federal or State Commission or agency. If said lease or any portion or portions thereof are so con-

[fol. 20] solidated and jointly operated, then and in such event it is agreed that the royalties produced from any well drilled upon any such community tract shall be prorated among the owners thereof in such proportion as the acreage owned by each Lessor bears to the acreage of the entire drilling unit.

16. The surface owner or lessee of said premises shall have gas free of cost from any well on said premises for domestic use thereon by making his own connection with the well.

In Witness Whereof, the parties hereunto subscribed their signatures on the day and year first above written.

The Commissioners of the Land Office of the State of Oklahoma, by C. C. Childers, Vice Chairman; Champlin Refining Company, Lessee, by H. H. Champlin, President. (Seal.)

Attest: Chas. B. Steele, Secretary to the Commissioners of the Land Office.

Attest: D. W. Cotton, Secretary. (Verified.)

EXHIBIT "B" TO COMPLAINT

The State of Oklahoma

Tract No. 15,

Oil and Gas Mining Lease

This Indenture of Lease, Made and entered into in duplicate, on this the 20th day of July A. D., 1942, by and between The Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Champlin Refining Company Enid, Oklahoma. party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Constitu- [fol. 21] tion and Laws of the State of Oklahoma, relating to the segregation of the oil and gas deposits and the leasing thereof on school and other public lands belonging to the State of Oklahoma, Witnesseth:

1. The lessor, for and in consideration of Three Thousand One Hundred Twenty-five & No/100 ($3,125.00) Dollars, the receipt whereof is hereby acknowledged, and of the

royalties, covenants, stipulations and conditions hereinafter contained and hereby agreed to be paid, observed and performed by the lessee, and his lawful assigns:

[The description of the lands, which is set out at this point in the lease, is identical with the description set out in paragraph 14 of the complaint (page 9 this record).]

does hereby demise, grant, lease and let unto the lessee for the term of five years from the date hereof, and as long thereafter as oil or gas or either of them is produced in paying quantities, all the oil deposits and natural gas in or under the following described tract of land lying and being within the County of Pawnee, in the State of Oklahoma, to-wit:

Tract No. 15. That portion of the Bed of the Arkansas River in Pawnee County, Oklahoma as above described,

and containing 281 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing and removing such oil and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost, oil and natural gas or fuel so far as necessary to the development and operation of said property.

[Paragraphs 2 to 16 of the lease are identical with paragraphs 2 to 16 of Exhibit A, which paragraphs appear at pages 15 to 20.]

[fol. 22] In Witness Whereof, the parties hereunto subscribed their signatures on the day and year first above written.

The Commissioners of the Land Office of the State of Oklahoma, by C. C. Childers, Governor and Chairman; Champlin Refining Company, Lessee, by H. H. Champlin, President. (Seal.)

Attest: Chas. B. Steele, Secretary to the Commissioners of the Land Office.

Attest: D. W. Cotton, Secretary. (Verified.)

IN UNITED STATES DISTRICT COURT

DISCLAIMER—Filed August 5, 1943

Comes Now the Champlin Refining Company, a corporation, organized and existing under the laws of Iowa, and disclaims all right, title, and interest in and to the property described in the Complaint filed in this action, and asks that this action be dismissed as to this defendant, with its costs.

Nathan Scarritt, E. S. Champlin, Enid, Oklahoma, Attorneys for Champlin Refining Company, an Iowa Corporation.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed August 5, 1943

The defendant, Champlin Refining Company, a New Mexico Corporation states as follows in answer to the Complaint of the Plaintiff:

The defendant admits the allegations contained in Paragraph I of the Complaint, that it is a corporation organized [fol. 23] and existing under the laws of New Mexico with license to do business in Oklahoma, and with principal place of business in Enid, Oklahoma.

Further answering, this defendant admits the allegations of Paragraphs II to XV, inclusive, of the Complaint:

Denies the allegations of Paragraph XVI of the Complaint;

Admits the allegations of paragraph XVII of the Complaint;

Denies the allegations of paragraph XVIII of the Complaint;

Denies the allegations of paragraph XIX of the Complaint to the effect that the defendant is trespassing upon the property described in the Complaint; admits the allegation to the effect that the instruments referred to in the

Complaint as Exhibits "A" and "B" have been placed of record in the office of the Secretary of the Commissioners of the Land Office of the State of Oklahoma, but denies that the United States holds title to the said property as Trustee for the allottees and their heirs as named in the Complaint, and denies that the defendant should be ousted from possession, or that the instruments referred to in the Complaint as Exhibit- "A" and "B" should be cancelled.

Wherefore, this defendant asks that the plaintiff take nothing by its Complaint, and for the costs of this action.

Nathan Scarritt, E. S. Champlin, Enid, Oklahoma, Attorneys for Champlin Refining Company, a New Mexico Corporation.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF STATE OF OKLAHOMA ON RELATION OF COMMISSIONERS OF THE LAND OFFICE TO INTERVENE—Filed August 20, 1943

Comes now the State of Oklahoma on the relation of the Commissioners of the Land Office and respectfully shows to the Court and alleges:

[fol. 24] 1. That the plaintiff claims to hold the lands or river bed and minerals thereunder, referred to in plaintiff's petition, in trust for the Indian allottees named in said petition and the heirs of the deceased allottees involved, and seeks to have cancelled and held for naught certain oil and gas leases, covering said lands, obtained by the defendant, Champlin Refining Company, a New Mexico corporation, from the State of Oklahoma on the relation of the Commissioners of the Land Office, and by said petition the plaintiff seeks to quiet title to said lands and minerals in the United States and said allottees and the heirs of the deceased allottees referred to in said petition; that the State of Oklahoma claims title to the lands and river bed described in plaintiff's petition and asserts that it is entitled as lessor to have said lands developed for oil and gas under the leases which plaintiff seeks to have cancelled; that the State of Oklahoma, by reason of its claim, is not

only an interested party but a necessary and indispensable party to a full and complete determination of plaintiff's action.

2. That this motion to intervene is filed under Rule 24 of the Federal Rules of Civil Procedure; that the representation of movant's interest in this litigation by existing parties is inadequate, and plaintiff by its action is seeking to bind the State of Oklahoma by a judgment in this action; and the claim or defense which the State of Oklahoma desires to make in this action involves both questions of law and fact in common with and adverse to the claims set forth in plaintiff's petition.

3. That the State of Oklahoma on the relation of the Commissioners of the Land Office desires to be permitted to intervene as a party defendant in this cause and a copy of the answer to plaintiff's petition, which the State of Oklahoma proposes to file in this cause if permitted to intervene herein, is attached hereto and made a part hereof.

Wherefore, movant prays for an order allowing the State of Oklahoma on relation of the Commissioners of the Land Office to intervene as a defendant in this action and enabling movant to defend this action for the purposes of protecting [fol. 25] its interest and asserting its right and title to the lands and minerals referred to in plaintiff's petition, or that movant have such other or further relief as to the Court may seem just and proper.

Mac Q. Williamson, Attorney Gen-ral of Oklahoma; J. Walker Field, Assistant Attorney General; Walter Marlin, Law and Executive Counsel to Commissioners of Land Office, State Capitol Building, Oklahoma City, Oklahoma, Attorneys for Movant.

Service of copy acknowledged this 18th day of August, 1943. Whit Y. Mauzy, U. S. Atty.

[Verified.]

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO INTERVENE—Filed August 20, 1943

This cause coming on to be heard on the 20 day of August, 1943, on the motion of the State of Oklahoma on the relation of the Commissioners of the Land Office for leave to intervene in the above entitled cause and to be made a party defendant thereto, and the motion having been duly considered and it appearing to the Court that movant has an interest in the above entitled suit sufficient to warrant it to become a party therein:

It Is Therefore Ordered, Adjudged and Decreed that the State of Oklahoma on the relation of the Commissioners of the Land Office be and is hereby granted leave to intervene in said cause as a party defendant.

Dated this 20 day of August, 1943.

Royce H. Savage, United States District Judge.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

INTERVENING ANSWER OF THE STATE OF OKLAHOMA ON RELATION OF THE COMMISSIONERS OF THE LAND OFFICE

Comes now the State of Oklahoma on the relation of the Commissioners of the Land Office, leave having first been granted by the Court to said State to intervene as a party defendant in this cause, and for separate answer to plaintiff's complaint alleges and states:

1. Intervening defendant admits the allegations contained in Paragraph I of plaintiff's complaint.

2. Intervening defendant denies the allegations contained in Paragraph II of plaintiff's complaint.

3. Intervening defendant denies the allegations contained in Paragraph III of plaintiff's complaint.

4. Intervening defendant denies the allegations contained in Paragraph IV of plaintiff's complaint.

5. Intervening defendant denies the allegations contained in Paragraph V of plaintiff's complaint.

6. Intervening defendant denies the allegations contained in Paragraph VI of plaintiff's complaint.

7. Intervening defendant denies the allegations contained in Paragraph VII of plaintiff's complaint.

8. Intervening defendant denies the allegations contained in Paragraph VIII of plaintiff's complaint.

9. Intervening defendant denies the allegations contained in Paragraph IX of plaintiff's complaint.

10. Intervening defendant denies the allegations contained in Paragraph X of plaintiff's complaint.

11. Intervening defendant denies the allegations contained in Paragraph XI of plaintiff's complaint.

12. Intervening defendant denies the allegations contained in Paragraph XII of plaintiff's complaint.

13. Intervening defendant admits the allegations contained in Paragraph XIII of plaintiff's complaint, and alleges further that the State of Oklahoma is the owner in fee simple and in possession of the lands described in said Paragraph XIII of plaintiff's complaint, the same being [fol. 27] the lands described in and covered by the oil and gas lease attached to and made a part of said complaint as "Exhibit A"; that said lands became the property of the State of Oklahoma by operation of law upon its admission as a State.

14. Intervening defendant admits the allegations contained in Paragraph XIV of plaintiff's complaint, and alleges further that the State of Oklahoma is the owner in fee simple and in possession of the lands described in said Paragraph XIV of said complaint, the same being the lands described in and covered by the oil and gas lease attached to and made a part of said complaint as "Exhibit B"; that said lands became the property of the State of Oklahoma by operation of law upon its admission as a State.

15. Intervening defendant admits the allegations contained in Paragraph XV of plaintiff's complaint.

16. Intervening defendant denies the allegations contained in Paragraph XVI of plaintiff's complaint.

17. Intervening defendant admits the allegations contained in Paragraph XVII of plaintiff's complaint.

18. Intervening defendant denies the allegations contained in Paragraph XVIII of plaintiff's complaint.

19. Intervening defendant, denies the allegations contained in Paragraph XIX of plaintiff's complaint to the effect that the defendant, Champlin Refining Company, a New Mexico corporation, is trespassing upon the property described in the complaint; and intervening defendant admits the allegation in said paragraph of the complaint to the effect that the instruments, referred to in the complaint as "Exhibits A and B", have been placed of record in the office of the Secretary of the Commissioners of the Land Office of the State of Oklahoma. Further intervening defendant denies that the United States holds title to said property as trustee for the allottees and their heirs, as named in the complaint, and denies that the defendant, Champlin Refining Company, a corporation, should be ousted from possession or that the instruments, referred to in the complaint as "Exhibits A and B", should be cancelled. Further answering said paragraph of the complaint, [fol. 28] intervening defendant alleges that the plaintiff and the allottees and the heirs of the deceased allottees, referred to in said complaint, have no right, title or interest in and to the lands involved in this action and are not entitled to an injunction enjoining the lessee of the State of Oklahoma from developing said lands for oil and gas under the leases obtained from the State of Oklahoma, and described in said complaint as "Exhibits A and B" thereto.

Wherefore, intervening defendant prays that the plaintiff take nothing by its complaint and for its costs.

Mac Q. Williamson, Attorney General of Oklahoma; J. Walker Field, Assistant Attorney General; Walter Marlin, Law and Executive Counsel to Commissioners of the Land Office, State Capitol Building, Oklahoma City, Oklahoma, Attorneys for Intervening Defendant.

[Verified.]

Affidavit of Mailing

State of Oklahoma,
Oklahoma County, ss:

Walter Marlin being duly sworn upon oath, deposes and says that on the 18th day of August, 1943, the enclosed a copy of the attached Motion in an envelope addressed to: Honorable Nathan Scarritt, Attorney at Law, Enid, Oklahoma, Attorney for Champlin Refining Company, with postate thereon fully prepaid, and deposited the same in the United States Post Office at the State Capitol, in Oklahoma City, Oklahoma.

Walter Marlin.

Subscribed and sworn to before me this 18th day of August, 1943. Jean Brawner, Notary Public. My commission expires October 27, 1945. (Seal.)

In United States District Court

Amendment to Answer—Filed October 15, 1943

For amendment to its answer filed herein, Champlin Refining Company alleges that the United States Supreme Court has confirmed the right of the State of Kansas to declare the rivers within its borders as navigable rivers, [fol. 29] and has confirmed the title of the state in and to the bed of such rivers.

The State of Kansas has declared the Arkansas river to be navigable within its boundaries and the title of the State of Kansas to the bed of such river has never been disputed because of the decision of the United States Supreme Court above mentioned, the bed of the said river having been a portion of the public domain of the United States at the time of the admission of the State of Kansas into the Union.

The claim of the plaintiff that a different rule should be applied to that portion of the bed of the Arkansas River which was a part of the public domain of the United States within the boundaries of Oklahoma would be a denial to the State of Oklahoma and to this defendant of the equal protection of the laws in violation of the Constitution of the United States.

Nathan Scarritt, E. S. Champlin, Attorneys for Champlin Refining Company.

[File endorsement omitted.]

In United States District Court

Amendment to Intervening Answer—Filed October 22, 1943

For amendment to its intervening answer filed herein, the State of Oklahoma on relation of the Commissioners of the Land Office alleges that the United States Supreme Court has confirmed the right of the State of Kansas to declare the rivers within its borders as navigable rivers, and has confirmed the title of the state in and to the bed of such rivers.

The S-ate of Kansas has declared the Arkansas River to be navigable within its boundaries and the title of the State of Kansas to the bed of such river has never been disputed because of the decision of the United States Supreme Court above mentioned, the bed of said river having been a portion of the public domain of the United States at the time of the admission of the State of Kansas into the Union.

The claim of the plaintiff that a different rule should be [fol. 30] applied to that portion of the bed of the Arkansas River which was a part of the public domain of the United States within the boundaries of Oklahoma would be a denial to the State of Oklahoma and to this defendant of the equal protection of the laws in violation of the Constitution of the United States.

Randall S. Cobb, Attorney General of Oklahoma; J. Walker Field, Assistant Attorney General; Walter Marlin, Law and Exe*f*utive Counsel to Commissioners of the Land Office, State Capitol Building, Oklahoma City, Oklahoma, Attorneys for Intervening Defendant.

Service of Copy Acknowledged This 22 day of Oct. 1943. Whit Y. Mauzy, U. S. Atty.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed November 19, 1943

Pursuant to Rule 56, Federal Rules of Civil Procedure, the plaintiff herein moves for summary judgment on the following grounds:

1. The pleadings in this proceeding, the Exhibits offered in evidence and introduced at the pre-trial conference herein, and the affidavit filed in support of this motion, show that there is no genuine dispute as to any material fact and the plaintiff is entitled to judgment as a matter of law.

2. The only factual allegation traversed by the answer is the declaration in the complaint that the Arkansas River at the points here involved was not navigable at the time the State of Oklahoma was admitted to the Union nor at any prior pertinent time. On this point the determination of non-navigability made by the United — District Court for the Western District of Oklahoma in the proceeding entitled United States v. Brewer-Elliott Oil & Gas Co., et al., No. 75 Equity, affirmed by both the Circuit Court of Appeals and the Supreme Court of the United States, is res [fol. 31] judicata and binding on the defendants in this proceeding.

3. This court can take judicial notice of the fact that, with respect to questions of title, the Arkansas River in Oklahoma above its confluence with the Grand River, was non-navigable at all times pertinent to the facts in this case.

4. The non-navigability of the Arkansas River in Oklahoma above its confluence with the Grand River at all times pertinent to the facts in this case is a law of property with respect to the title to land within the bed of that river.

Wm. Knight Powers, Assistant United States Attorney, Northern District of Oklahoma.

I, Wm. Knight Powers, do hereby certify that on the 19th day of November, 1943, a copy of the foregoing motion was mailed to the Attorney General of the State of Oklahoma, Attorney for Intervener, and a copy to Scarritt and Champlin, Attorneys at Law, Enid, Oklahoma, Attorneys for Defendant herein.

Wm. Knight Powers.

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Wm. Knight Powers, Assistant United States Attorney in and for the Northern District of Oklahoma, and attorney for the plaintiff herein, being of lawful age and first duly sworn, does on oath state:

That there is attached to said Motion for Summary Judgment, Exhibit "A", which exhibit is a map and plat of the Arkansas River wherein said river divides Osage County and Pawnee County, State of Oklahoma. The said map reveals thereon location of Tracts 14 and 15, leases executed by the School Land Commission of the State of Oklahoma to the Champlin Refining Company, and also the tracts of [fol. 32] land which were concerned and involved in the litigation known as United States v. Brewer-Elliott Oil & Gas Company, No. 75 Equity, Western District of the State of Oklahoma. That said map is a faithful reproduction of the area involved and is accurately and correctly prepared so as to show the comparison of the locations of the real estate involved in this litigation and the real estate concerned in the case of United States v. Brewer-Elliott Oil and Gas Company.

Said witness further deposes and says that there is attached hereto and marked Exhibit "B", a map or plat showing Tracts 14 and 15, leased by the School Land Commission, State of Oklahoma to the Champlin Refining Company, which map also shows thereon the tracts of land owned by plaintiff's wards herein as riparian owners.

Witness further deposes and says that there is attached hereto and marked as Exhibit "C", a copy of the opinion rendered in United States v. Brewer-Elliott Oil and Gas Company, et al., No. 75 Equity, Western District of Oklahoma, dated February 21, 1918.

Witness does further on oath state and depose that there is attached hereto and marked Plaintiff's Exhibit "D", Order by John H. Cotteral, District Judge for the Western District, State of Oklahoma, dated February 21, 1918, which Order recited that the findings contained in the written opinion marked Plaintiff's Exhibit "C", shall be and the

same are adopted as the Findings of Fact by the Court therein.

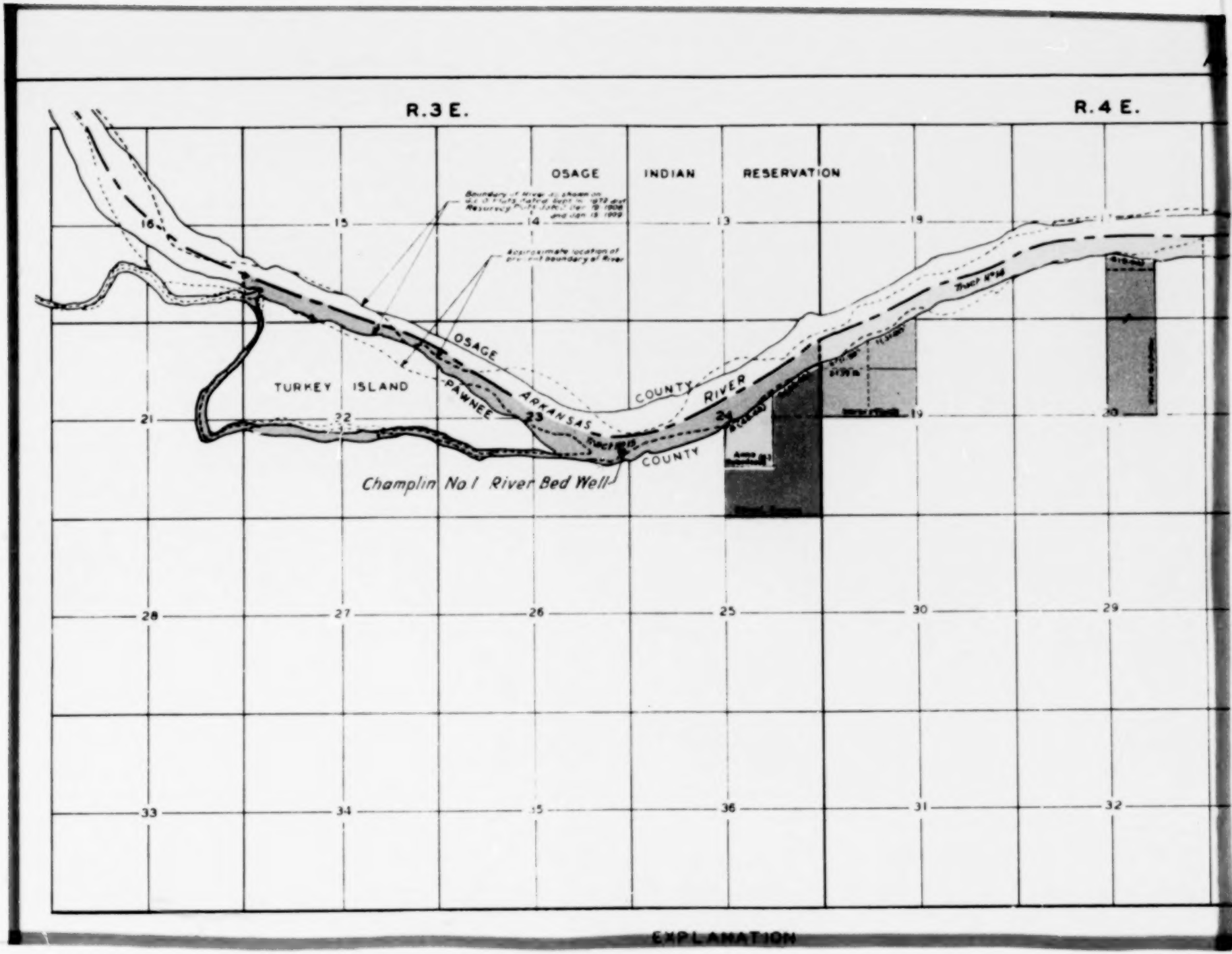
Wm. Knight Powers, Assistant United States Attorney.

Subscribed and sworn to before me this 19 day of Nov. 1943. Dorothy Lonergan, Notary Public. My Commission Expires: Jan. 5, 1944.

[fols. 33-34] EXHIBIT A TO MOTION FOR SUMMARY JUDGMENT

[Exhibit A is a map and plat of Arkansas River wherein said river divides Osage and Pawnee Counties, Oklahoma. It is not deemed practicable to insert a copy of the map in the printed record. Copies of the map are available for the use of the Court.]

(Here follows 1 Photolithograph, side folio 35-36)



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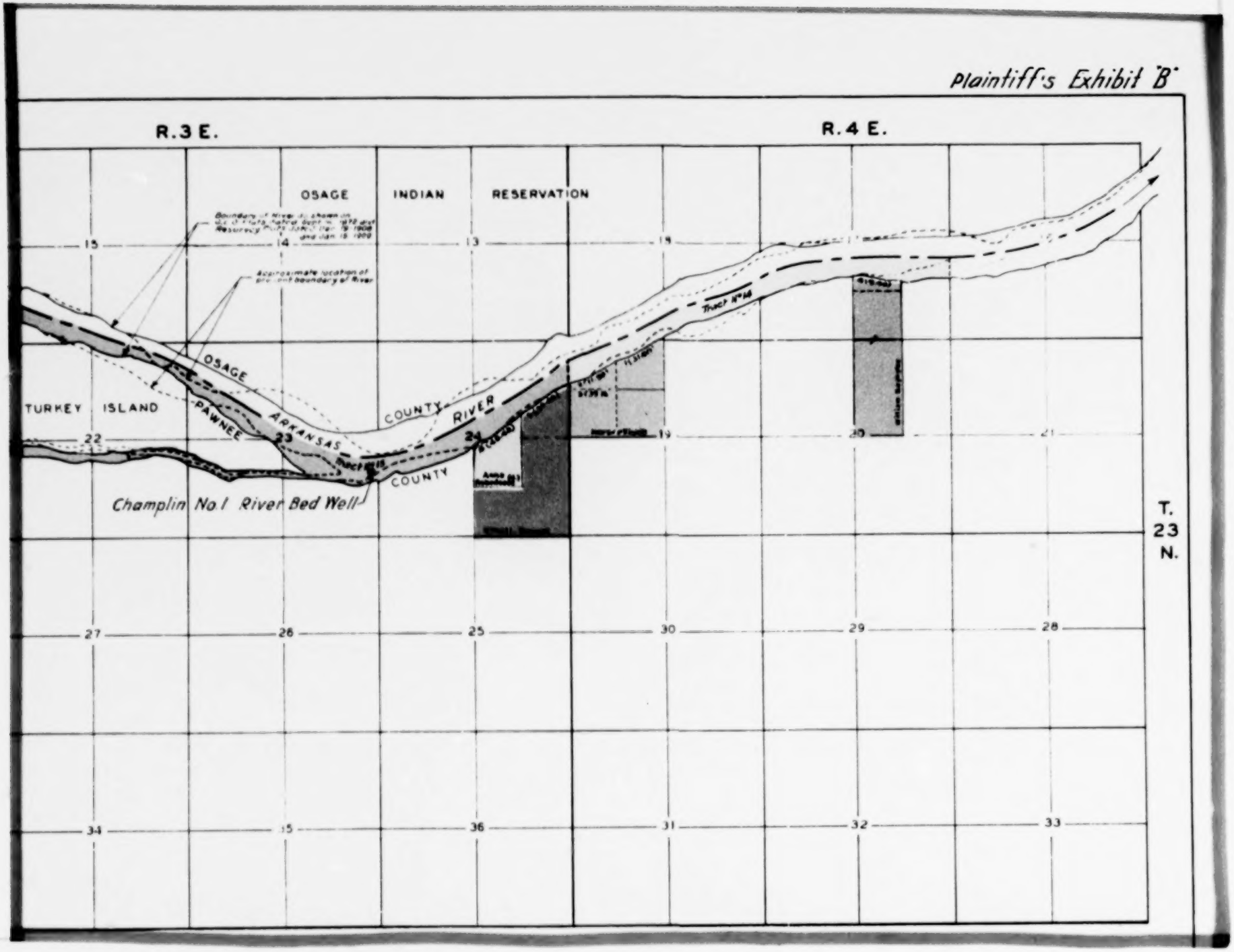
Plaintiff's Exhibit "B"



[fol. 37] [Exhibit C to the motion for summary judgment, opinion, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al., is reported at 249 Fed. 609, and the court by order of May 26, 1945, authorized reference to this exhibit without it being printed.]

[Exhibit D to the motion for summary judgment, order, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al., that findings of fact in the opinion be adopted as findings of fact by the court, is identical with plaintiff's exhibit 23 which appears at original page 135.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed November 19, 1943

Wm. Knight Powers, being first duly sworn on oath, states that he is Attorney for the plaintiff, herein, and that there is attached herewith certified copy of the Decree entered on the 21st day of February, 1918, in the cause, "United States of America, Plaintiff, vs. Brewer-Elliott Oil & Gas Company, et al., Defendants, No. 75, in Equity.

Wm. Knight Powers.

Subscribed and sworn to before me this 2nd day of December, 1943. Dorothy Lonergan, Notary Public. My Commission Expires: Jany. 5, 1944. (Seal.)

I hereby certify that copy of Affidavit in Support of Plaintiff's Motion for Summary Judgment, together with certified copy of Decree has this 2nd day of December, 1943, been mailed to Scarritt & Champlin, Attorneys at Law, Attorneys for Defendant, Enid, Oklahoma, and to the Attor-

ney General of the State of Oklahoma, Attorney for Intervener herein, Oklahoma City, Oklahoma.

Wm. Knight Powers.

Copy of Decree attached withdrawn and entered as [fol. 38] Plaintiff's Ex. No. 24 at trial of cause, which exhibit appears at original page 136.

[File endorsement omitted.]

In United States District Court

Stipulation—Filed June 26, 1944

It is hereby stipulated and agreed by and between the United States of America, plaintiff herein, the Champlin Refining Company, defendant herein, and the State of Oklahoma ex rel. Commissioners of the land office, intervener herein, that in the event the judgment is rendered in the above-entitled cause of action, to-wit: No. 1044 Civil, United States District Court for the Northern District of Oklahoma, adverse to the claim of title by the United States of America in behalf of the Indian wards herein, that the defendant Champlin Refining Company, and the intervener, State of Oklahoma, will not assert the judgment entered in this cause to be res adjudicata of any future action which may or might be brought by the United States of America for its own benefit as claiming title in the United States of America, as distinguished from the title of the United States of America for the benefit of the restricted Indian wards set out in the complaint herein.

Randell S. Cobb, Attorney General, State of Oklahoma. Walter Marlin, Attorney for School Land Commission. Nathan Scarritt, E. S. Champlin, Attorneys for Defendant, Champlin Refining Company. Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma. —— ——, Assistant Attorney General of the United States.

The foregoing stipulation and agreement entered into by [fol. 39] and between all of said parties in said action, is this 26th day of June, 1944 approved and confirmed.

Royce H. Savage, United States District Judge.

[File endorsement omitted.]

In United States District Court

Order Overruling Plaintiff's Motion for Summary Judgment—Filed August 10, 1944

Now on this 8th day of August, 1944, this matter having been heretofore assigned for oral argument, and having been argued by counsel appearing for the United States of America, Plaintiff, and counsel appearing for the State of Oklahoma, Intervener, and the Champlin Refining Company, Defendant, and the Court being otherwise fully advised in the premises, finds that said motion should be denied and overruled.

Wherefore, It Is Ordered, Adjudged and Decreed that Plaintiff's motion for summary judgment be, and the same is hereby overruled and denied.

Royce H. Savage, Judge.

[File endorsement omitted.]

In United States District Court

Plaintiff's Requested Findings of Fact and Conclusions of Law—Filed September 5, 1944

Findings of Fact

I

That this action was brought by the United States, through the Attorney General at the request of the Secretary of the Interior, in its own behalf and in behalf of and as guardian of the restricted Indians hereinafter mentioned.

II

That the defendant Champlin Refining Company is a cor-
[fol. 40] poration organized under the laws of the State of New Mexico, authorized to do business and doing business in the State of Oklahoma and was duly served with process. That the State of Oklahoma, on the relation of the Commissioners of the Land Office, was permitted to intervene.

III

That in accordance with the treaties of May 6, 1828, 7 Stat. 311, February 14, 1833, 7 Stat. 414, and Decem-

ber 29, 1835, 7 Stat. 478, the United States conveyed to the Cherokee Nation by deed dated December 31, 1838, a large tract of land in Northern Oklahoma, including the land on both sides and the bed of the Arkansas River at the locations in suit.

IV

That by Treaty of July 19, 1866, 14 Stat. 799, the Cherokee Nation agreed that the United States might settle friendly Indians upon that part of their lands known as the Cherokee Outlet. That the Sixteenth Article of the Treaty provided that the lands were to be conveyed to the friendly Indians located thereon and required that the districts on which each group of Indians should be located be in compact form and the boundaries distinctly marked.

V

That by treaty between the United States and the Cheyenne and Arapahoe Indians dated October 28, 1867, 15 Stat. 593, there was set aside for them out of the Cherokee Outlet, a reservation extending from the Arkansas River to the Cimmarron River. By the terms of this treaty, the reservation for the Cheyenne and Arapahoe Indians was expressly extended to the middle of the Arkansas River. That the Cheyenne and Arapahoe Indians decided not to go upon this land and an agreement was obtained from them relinquishing their claim. H. R. Ex. Doc. No. 89, 47th Congress, 1st sess.

VI

That the land along the Arkansas River on both sides of the river at the locations in question, was first surveyed into sections, townships and ranges in September, 1872.

[fol. 41] VII

That in accordance with the 1866 Treaty with the Cherokee Nation and pursuant to authority contained in the Act of March 3, 1881, 21 Stat. 380, the Secretary of the Interior on the 25th day of June, 1881, designated and assigned for the use and occupation of the confederated Otoe and Missouria Tribe of Indians:

That portion of Tp. 23 N., R. 3 E lying West of the Arkansas River (and other townships not involved in this suit.)

VIII

That pursuant to the 1866 Treaty with the Cherokee Nation and pursuant to the authority granted by the Act of March 3, 1883, 22 Stat. 603, 624, the Cherokee Nation, for a valuable consideration by its duly authorized officials on the fourteenth day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Otoe and Missouria Indians:

Fractional township 23 North, Range 3 East of the Indian Meridian (lying and being on the right bank of the Arkansas River, according to the plat annexed) (and other townships not included in this suit).

IX

That by the Act of April 10, 1876, 19 Stat. 28, there was set aside as a reservation for the use and occupation of the Pawnee Tribe of Indians

All that tract of country between the Cimmarron and Arkansas Rivers embraced within the limits of Township 23 North, of Range 3 East (together with other townships) of the Indian Meridian

provided that the terms of the Sixteenth Article of the Cherokee Treaty of 1866 were to be complied with so far as the same might be applicable.

X

That in accordance with the 1866 Treaty with the Cherokee Nation, and pursuant to the authority contained in the [fol. 42] Act of March 3, 1883, 22 Stat. 603, 624, the Cherokee Nation, for a valuable consideration by its duly authorized officials on the fourteenth day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Pawnee Tribe of Indians:

"Fractional township 23 North, Range 4 East of the Indian Meridian (and other townships not involved in this suit) "the fractional townships being on the right bank of the Arkansas River."

XI

That the Treaty of 1867 with the Cheyenne and Arapahoe Indians expressly included in the reservation created for those Indians the south half of the bed of the Arkansas River. That in the creation of the reservations for the Pawnee and for the Otoe and Missouria Indians, the river bed was neither expressly included in nor excluded from the lands set aside for the Indians.

XII

That on the ninth day of October, 1893, a trust patent was issued to Horace Fields, an Indian of the Pawnee Tribe, being Allottee No. 28, covering the following described land:

The SE¼ of NW¼ and Lots 1, 2 and 3 of Section 19, Township 23 N. of Range 4 East of the Indian Meridian in Oklahoma, containing 121.66 acres.

That thereafter the allottee Horace Fields died and his heirs were determined by the Department of the Interior to be his wife, Eva R. Weeks and his son, Arthur Fields, each of whom took a one-half interest in and to said allotment.

That thereafter by deed duly approved by the Department of the Interior on June 13, 1922, Eva R. Weeks conveyed a one-fourth interest in the allotment of Horace Fields to Arthur Fields. That Eva R. Weeks thereafter died and her heirs were determined by the Department of the Interior to be:

Anna Barker, Jennie Davis, Lena Brown, Arthur Fields, each of whom received a one-fourth interest in the estate of Eva R. Weeks. That the title to the real estate above de- [fol. 43] scribed is now held in trust and was so held on the twentieth day of July, 1942 and prior thereto by the United States of America in trust for the following Indians in the proportionate interests set opposite their names:

Arthur Fields	13/16
Anna Barker	1/16
Jennie Davis	1/16
Lena Brown	1/16

XIII

That on the ninth day of October, 1893, a trust patent was issued to William Bayhylle, an Indian of the Pawnee Tribe,

being Allottee No. 302, covering the following described real estate:

The W½ of NE¼ of Sec. 20 and the SW¼ of SE¼ and Lot 6 of Sec. 17, Twp. 23 N. of R. 4 E. of the Indian Meridian in Oklahoma containing 129 acres.

That the said William Bayhylle died on or about the 26th day of April, and his heirs were determined by the Department of the Interior to be as follows:

Kittie Bayhylle, wife	7/21
Edward Bayhylle, son	2/21
Daniel Bayhylle, son	2/21
Elijah Bayhylle, son	2/21
Violet Rappuie, daughter	2/21
William Bayhylle, Jr., son	2/21
Louis Bayhylle, son	2/21
Elmer Bayhylle, son	2/21

That thereafter Elijah Bayhylle died and Kittie Bayhylle was determined by the Department of the Interior to be his sole heir; that thereafter on or about the eighteenth day of August, 1940, Kittie Bayhylle died and her heirs were determined by the department of the Interior to be as follows:

[fol. 44] Daniel Bayhylle, son	2/12
Violet Bayhylle, daughter	2/12
William R. Bayhylle, son	2/12
Louis D. Bayhylle, son	2/12
Elmer Bayhylle, son	2/12
Perry W. Moore, grandson,	1/12
Lucille M. Moore, granddaughter	1/12

That the title to the real estate above described allotted to William Bayhylle, of which only

Lot 6 and the SW¼ of the SE¼ of Sec. 17, Twp. 23 N. of R. 4 E. of the Indian Meridian

is herein involved is now held in trust by the United States of America for the following heirs to the estate of William Bayhylle:

Edward Bayhylle	3/84
Daniel Bayhylle	14/84
Violet Bayhylle	14/84

William R. Bayhylle	14/84
Louis D. Bayhylle	14/84
Elmer Bayhylle	14/84
Perry W. Moore	3/84
Lucille M. Moore	3/84

XIV

That on the twenty-fourth day of November, 1906, a trust patent was issued to Ethel Lewis Barnes, an Indian of the Otoe Tribe, being Allottee No. 454, covering the following described real estate:

The S½ of SE¼ and the NE¼ of SE¼ and Lot 5 of Sec. 24 in Twp. 23 N. of R. 3 E. of the Indian Meridian in Oklahoma, containing 152.20 acres.

That the title to the above-described real estate so allotted to Ethel Lewis Barnes of which only

Lot 5 of Sec. 24 in Twp. 23 N. of R. 3 E. of the Indian Meridian in Oklahoma,

is involved herein, is now held in trust by the United States of America for the said allottee Ethel Lewis Barnes.

[fol. 45] XV

That on the tenth day of June, 1907, a trust patent was issued to Anna Robedeaux, an Indian of the Otoe Tribe, being Allottee No. 409-A, covering the following described real estate:

The W½ of SE¼ and the SE¼ of SE¼ of Sec. 1 and the SW¼ of NE¼ of Sec. 13 in Twp. 22 N. of R. 1 E. and Lot 6 of Sec. 24 in Twp. 23 N. of R. 3 E. of the Indian Meridian in Oklahoma, containing 205.45 Acres.

That the said Anna Robedeaux died on or about June 4, 1933, and her heirs were determined by the Department of the Interior to be

Belle Robedeaux, Pearl Robedeaux, Mary Robedeaux, Naomi Robedeaux,

each of whom received a one-fourth interest in and to the above-described real estate allotted to the said Anna Robedeaux; that thereafter Belle Robedeaux died and her heirs were determined by the Department of the Interior to be:

William Burgess, Dewey W. Daily, Esther Burgess, Earl Burgess, Lucy Burgess, Annie Burgess, Curtis F. Burgess,

each of whom inherited a one-seventh interest in and to the estate of Belle Robedeaux. That the title to the real estate above described allotted to Anna Robedeaux, of which only

Lot 6 of Sec. 24 in Twp. 23 N. of R. 3 E. of the Indian Meridian, in Oklahoma,

is herein involved, is now held in trust by the United States of America for the following heirs of Anna Robedeaux:

Pearl Robedeaux	9/36
Mary Robedeaux	9/36
Naomi Robedeaux	9/36
William Burgess	3/36
Dewey W. Daily	1/36
Esther Burgess	1/36
Earl Burgess	1/36
Lucy Burgess	1/36
Annie Burgess	1/36
Curtis F. Burgess	1/36

[fol. 46]

XVI

That there was issued to each of the allottees a trust patent as authorized by Section 5 of the Act of February 8, 1887, 24 Stat. 388, which provided that the United States would hold the allotments in trust for twenty-five years for the use and benefit of the respective allottees and the heirs of the deceased allottees. That under authority contained in Section 5 of the Act of February 8, 1887, by Executive Orders, the trust periods have been extended, and the United States continues to hold the lands allotted to the various allottees named in the foregoing paragraphs in trust for said allottees or their heirs.

XVII

It was the object and purpose of the United States and its intention in creating the Pawnee Indian Reservation, the Otoe and Missouria Indian Reservation, and in making allotments in severalty to members of these tribes, that all conveyances of lands along the Arkansas River should extend to the middle of said river and should include the south half of the river bed.

XVIII

That on or about July 20, 1942, the Commissioners of the Land Office of the State of Oklahoma, purporting to act under and in pursuance of the authority of the State of Oklahoma, executed two oil and gas leases covering the South half of the bed of the Arkansas River where it flows through the Pawnee and Otoe and Missouria Indian Reservations. That both of the purported leases were executed without the authority or consent of the plaintiff herein or the allottees or the heirs of deceased allottees of the lands herein involved and without the consent or approval of the Secretary of the Interior.

XIX

That the Arkansas River at all points in question in this litigation and at all times herein material is not navigable in fact. That the navigability of the Arkansas River at the time and at the places herein involved has been adjudicated in the case of United States v. Brewer-Elliott Oil and Gas [fol. 47] Co., No. 75 Equity, United States District Court for the Western District of Oklahoma, affirmed by the Circuit Court of Appeals for the Eighth Circuit in Brewer-Elliott Oil and Gas Co. v. United States, 270 Fed. 100 (1920), and also affirmed by the Supreme Court of the United States in Brewer-Elliot Oil and Gas Co. v. United States, 260 U. S. 77 (1922), in which suit the United States and the State of Oklahoma, grantor in the oil and gas leases to the Champlin Refining Company, were parties. In said litigation it was determined that the Arkansas River at the times and at all places herein involved, was not navigable in law or in fact.

XX

That all the material allegations of the complaint have been sustained by competent proof.

XXI

That the lands allotted as set forth in findings of fact XII, XIII, XIV and XV are described by legal subdivision in accordance with the Government survey. Such lands are situated on the south bank of the Arkansas River.

XXII

That prior to the conveyances by the Cherokee Nation to the United States in trust for the Pawnee Tribe and the Otoe and Missouria Indians, the Cherokee Nation had conveyed to the Osage Nation of Indians the land lying on the north bank of the Arkansas River directly opposite the allotments here in controversy. That the conveyance from the Cherokee Nation to the Osage Nation included the north half of the bed of the Arkansas River in accordance with the Act of June 5, 1872, 17 Stat. 228.

From the foregoing findings of fact, the court makes the following

CONCLUSIONS OF LAW

I

That the plaintiff is entitled to a judgment as prayed for in the complaint.

[fol. 48]

II

That this Court has jurisdiction of the defendant Champlin Refining Company and the intervener State of Oklahoma, and of the subject matter of this suit.

III

The construction of all conveyances mentioned in the foregoing findings of fact is a matter to be determined in accordance with federal law.

IV

Under and by virtue of the allotments set forth in paragraphs XII, XIII, XIV and XV of the foregoing findings of fact, the lands there described are and at all times here material have been held in trust by the United States for the use and benefit of the allottees and the heirs of the deceased allottees, in accordance with the Act of February 8, 1887, 24 Stat. 388, and other applicable law.

V

That the case of United States v. Brewer-Elliott Oil and Gas Co., No. 75 Equity, Western District of Oklahoma, affirmed by the Circuit Court of Appeals for the Eighth Cir-

cuit in Brewster-Elliott Oil and Gas Co. v. United States, 270 Fed. 100 (1920), and also affirmed by the Supreme Court of the United States in Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77 (1922), adjudicated that the Arkansas River was non-navigable in law and in fact at all times and at all places herein involved. That the judgment in that case determining that the Arkansas River is non-navigable is res judicata as to all parties to this action and they are bound thereby.

VI

That the reservation created for the Otoe and Missouria Indians by the order of the Secretary of the Interior dated June 25, 1881, extended to the middle of the Arkansas River and included the south half of the bed of the river.

VII

That the reservation conveyed by the Cherokee Nation to the United States in trust for the Otoe and Missouria [fol. 49] Tribe by deed dated June 14, 1883, extended to the middle of the Arkansas River and included the south half of the bed of the river.

VIII

That the reservation set aside for the Pawnee Indians by the Act of April 10, 1876, 19 Stat. 29, extended to the middle of the Arkansas River and included the south half of the bed of the river.

IX

That the reservation conveyed by the Cherokee Nation to the United States of America in trust for the Pawnee Indians by deed dated June 14, 1883, extended to the middle of the Arkansas River and included the south half of the bed of the river.

X

That the allotments to the Pawnee and Otoe and Missouria Indians described in Paragraphs XII, XIII, XIV and XV of the foregoing findings of fact each extended to the middle of the Arkansas River.

XI

That the State of Oklahoma does not now have and never has had any right, title or interest in any part of the bed of the Arkansas River at any of the locations involved in this suit.

XII

That the plaintiff is entitled to have its title and the title of its Indian wards in and to each of the allotments described in Paragraphs XII, XIII, XIV, and XV of the foregoing findings of fact quieted and confirmed and the plaintiff is entitled to a judgment declaring that said allotments extended to the middle of the main channel of the Arkansas River.

The defendant Champlin Refining Company and the intervener, State of Oklahoma have no right, title or interest [fol. 50] in and to the bed of the Arkansas River at the locations involved in this suit and each of them should be enjoined from asserting any claim or title to said lands and from interfering with the use and occupation of said lands by the plaintiff.

Whit Y. Mauzy, United States Attorney; Wm. Knight Powers, Assistant United States Attorney, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Stipulation—Filed September 16, 1944

It is stipulated and agreed that it shall be considered that the plaintiff has introduced evidence in the above entitled action showing that the Arkansas River is not navigable in fact at the places in question, on all material dates in this controversy.

It is further stipulated and agreed that it shall be considered that the defendant and intervener have not introduced any evidence on the question of navigability, and that they have objected to the plaintiff's evidence on the ground that such evidence is irrelevant and immaterial because the finding and rule of property announced by the Supreme

Court of Oklahoma in State v. Nolegs, 40 Okla. 479, are binding upon the court in the present action.

It is further stipulated that for the purpose of this case the meander line of the South shore of the Arkansas River, as shown on the government survey, Defendant's Exhibit "7", shall be construed to represent the true mean high water mark of the said river at all times material in this case; provided however, that this stipulation shall not prejudice the right of any party in this action to litigate [fol. 51] in another action the actual location of the shore of the said river.

Whit Y. Mauzy, United States Attorney; Wm. Knight Powers, Assistant United States Attorney, Attorneys for Plaintiff; Randell S. Cobb, Attorney General, State of Oklahoma; J. Walker Field, Assistant Attorney General, State of Oklahoma; Walter Marlin, Law and Executive Counsel for the Commissioners of the Land Office of the State of Oklahoma, Attorneys for Intervener; Nathan Scarritt, E. S. Champlin, Attorneys for Champlin Refining Company, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed September 16, 1944

It is stipulated and agreed by and between the parties hereto as follows:

The Champlin Refining Company has drilled a well at the location shown on the attached Exhibit "A" which well is now producing oil in commercial quantities.

It is further stipulated that a photograph of the said well and of that portion of the Arkansas River in which it was drilled was taken by Dick McConkay, on June 17, 1944 from a location on the south bank of the Arkansas River, approximately five hundred feet east of the said well; and that if Dick McConkay were present he would testify that the photograph attached hereto as Exhibit "B" is a true and correct photograph of the said well as above described.

It is further stipulated and agreed that the certificates of

Phil R. Hawkins, Chairman of the Board of Administration of the State of Kansas, hereto attached as Exhibit "C", [fol. 52] "D" and "E", respectively, may be introduced in evidence in this action as though the statements therein contained were testified, by him in person.

It is further stipulated that the plaintiff raises no objection as to the form of such evidence, but reserves objections as to all of the evidence herein above described as irrelevant and immaterial.

—— ——, United States Attorney; Wm. Knight Powers, Assistant United States Attorney, Attorneys for Plaintiff; Randell S. Cobb, Attorney General, State of Oklahoma; J. Walker Filed, Assistant Attorney General, State of Oklahoma; Walter Marlin, Law and Executive Counsel for the Commissioners of the Land Office of the State of Oklahoma, Attorneys for Intervener; Nathan Scarritt, E. S. Champlin, Attorneys for Champlin Refining Company, Attorneys for Defendant.

[File endorsement omitted.]

[Exhibit A, map or plat showing tracts Nos. 14 and 15 leased by School Land Commission to Champlin Refining Company, showing Champlin No. 1 river bed well, is identical with exhibit B to the motion for summary judgment which appears at page 35.]

(Here follows 1 Photolithograph, side folio 53-54)

53-54

[fol. 55] EXHIBIT "C" TO STIPULATION

Phil R. Hawkins, Chairman; H. D. Bates, Member

Andrew F. Schoeppel, Governor; C. V. Kincaid, Business Manager

State of Kansas

Board of Administration

Penal Institutions

Topeka

CERTIFICATE

STATE OF KANSAS,
Shawnee County, ss:

Affiant, Phil R. Hawkins, Chairman of Kansas State Board of Administration, deposes and says that the State of Kansas, has leased portions of the bed of the Arkansas River and has the following producing wells on said river being produced by following producers and that the state of Kansas has collected royalty mentioned below which is all deposited to credit of General Revenue of Kansas.

County	*Lessee* & Producer	Production since	Sec. Twp. Rng. &
Reno.	Aldon Gasoline Co-City Service	Dec- 37—$ 266.92,	18, 19, 20T20R4
Rice.	E. C. Mengenbeck-Consolidated Gas Co.	Dec- 39—10075.83,	sw of SE22-21-19
Reno.	Nat. Pet. Co. Derby Oil Co.	Jun- 37—14379.15,	S20T24S, R4W
Barton	Derby Oil Co.	Aug- 40— 3596.53,	SE 36-19-12
Sumner	Shell Pet. Co.	Jun- 37—19739.17,	26.31S.R2E
Barton	Derby Oil Co-Standard Oil Co.	Sept- 39—35893.88,	TWP 20S, R. 11W
Rice.	W. H. Bartlett-Sinclair Pr-MKT Co.	Oct- 43— 859.40,	18, 19 T 20, R. 10W
Rice,	Vickers Petroleum Co.	Mch- 43— 448.80,	S/2 SE, 19-20-10
Rice,	Vickers Petroleum Co.	Jly- 43— 227.44,	NW of SE & NE of SW 19-20-10

[fol. 56] The above figures are correct.

Further affiant sayeth not.

Witness name and official seal this 12th day of June, 1944.

Phil R. Hawkins, Chairman of Board of Administration of State of Kansas. (Seal.)

EXHIBIT "D" TO STIPULATION

Phil R. Hawkins, Chairman; H. D. Bates, Member

Andrew F. Schoeppel, Governor; C. V. Kincaid, Business Manager

State of Kansas

Board of Administration

Penal Institutions

Topeka

August 23, 1944.

STATE OF KANSAS,
County of Shawnee, ss:

I, Phil R. Hawkins, Chairman of the Kansas State Board of Administration, hereby certify that the attached statements concerning leases on Arkansas River in Kansas are correct to the best of my knowledge and belief.

Phil R. Hawkins, Chairman State Board of Administration. (Seal.)

[fols. 57-58]

Non-Producing Leases on Arkansas Riverbed Made by Kansas State Board of Administration and Executive Council, and Which Have Not Expired. (As of Aug. 23, 1944)

Description	County	Acreage	Date Leased	Lessee	Amt. Yrly. Rent
Sec. 31 T. 32-3	Cowley)	216.5	7-21-41	Tulsa Oil Company	$216.50
NW 6 T. 33-3	")				
SE 36 T. 32-2	Sumner)				
NE 1 T. 33-2	")				
30-31 T. 20-14	Barton)	194.7	1-15-41	Cont. Oil Company	$194.70
36 T. 20-15	")				
1-2-3 T. 25-15	Pawnee)				
27-30-34 T. 22-17	Pawnee	553.19	1-25-43	Cont. Oil Company	$553.19
3-4-9-10-11 T. 24-5	Reno	213.	4- 8-43	W. N. Bartlett	$213.00
6-7-8-16 T. 22-7	Reno	189.20	8-13-43	Phillips Pet. Co.	$189.20
E½ 23-22-5	Reno	320	9- 2-43	R. L. Hodge	$320.00
S½ 29 All 32 T. 20-10	Rice	156.55	3-19-43	W. H. Bird and M. J. Boreing	$156.55
11-13-24 T. 25-3	Sedgwick)	180.87	9-30-43	Phillips Pet. Co.	$180.87
18-19 T. 25-2	")				
35-36 T. 24-4	Reno)	185.31	9-30-43	H. D. Hurst	$185.31
1 T. 25-4	")				
6 T. 25-3	Sedgwick)				
18-19-20 T. 21-9	Rice	460.92	12-30-43	Chas. E. Straub	$460.92
S½ 25 All 36 T. 26-1	Sedgwick)	462.27	12-30-43	H. H. Royer	$462.27
1 T. 27-1	")				
32-33-34 T. 12-20	Douglas and Leavenworth	274.05	3- 3-44	J. M. Huber, Corp.	$274.05
1-12-13 T. 35-4	Cowley)	185.60	3-23-44	E. M. Quinn	$185.60
6-7-18 T. 35-5	")				
E½ 16 T. 34-3	")	.50	9- 2-43	John M. Moore	$ 50.00
7-17-18 T. 30-2	Sumner	281.42	3-23-44	R. E. Bending	$281.42

[fols. 59-60]

Description	County	Acreage	Date Leased	Lessee	Rentals Amt. Collected
Btn. No. line 5 T. 28-1 and S. li. 15 T. 28-1	Sedgwick	289.56	3-25-29	Dixie Oil Co.	$289.56
Btn. No. li. 21 T. 33-3 and W. li. 28 T. 33-3	Cowley	176.70	7- 5-29	T. M. Deal	$176.70
Btn. No. li. 36 T. 26-1 and E. li. 12 T. 27-1	Sedgwick	354.	9- 4-28	E. F. Bloss and W. D. Jochems	$354.00
Btn. W. li. 10 T. 26-1 and S. li. 15 T. 26-1	Sedgwick	200.	9- 7-28	Same	$200.00
Btn. W. li. 26 T. 25-2 and E. li. 8 T. 26-1	Sedgwick	.....	8-27-28	Tom C. Johnson	———
Btn. W. li. 9 T. 26-1 and E. li. 4 T. 9-26	Sedgwick	109.	9- 5-28	Hart, Clare, Lee Hal M. Black	$109.00
Btn. W. li. SE¼ 14 T. 26-1 and S. Li. 24 T. 26-1	Sedgwick	180.	8-18-28	Tom Harley	$180.00
Btn. W. li. 6 T. 25-3 and E. li. T. 25-3	Sedgwick	953	9- 7-28	J. A. Vickers	$953.00
Btn. N. li. 25 T. 26-1 and S. li. 25 T. 26-1	Sedgwick	93.20	8-27-28	G. A. Stearns	$ 93.20
Btn. N. li. 27 T. 28-1 and S. li. 35-28-1	Sedgwick	123.50	9-20-30	W. G. Haun	$123.50
Btn. N. li. 22 T. 28-1 & S. li. 22 T. 28-1 &	Sedgwick	112.46	4-15-29	Stearns & Streeter	$112.46

Description	County	Acreage	Date Leased	Lessee	Rentals Amt. Collected
Btn. W. li. 35 T. 28–1 & S. li. 35 T. 28–1	Sedgwick		8–27–28	" " "	$ 1.00 per A.
Btn. E. li. 15 T. 26–1 & E. li. SW¼ T. 26–1	Edwards	1500.	6– 8–28	Amarada Pet. Corp.	$750.00
Btn. N. li. 16 T. 25–19 and S. li. 16 T. 26–20	Cowley & Sumner	166.9	6–16–28	Gideon Coulter	$167.00
Btn. N. li. 31 T. 32–3 and S. li. 6 T. 33–3	Shawnee & Jefferson		12–19–29	A. W. Forrester	$ 1.00 per A.
Twp. 11 R. 16	Sumner	182.40	10–15–30	Trees Oil Co.	$182.40
Btn. W. li. 21 T. 30–2 & S. li. 34 T. 30–2					

[fols. 61-62] EXHIBIT "E" TO STIPULATION

Phil. R. Hawkins, Chairman; H. D. Bates, Member

Andrew F. Schoeppel, Governor; C. V. Kincaid, Business Manager

State of Kansas

Board of Administration

Penal Institutions

Topeka, August 23, 1944.

STATE OF KANSAS,
County of Shawnee, ss:

I, Phil R. Hawkins, Chairman of the Kansas State Board of Administration, hereby certify that the attached statements concerning leases on Arkansas River in Kansas are correct to the best of my knowledge and belief.

Phil R. Hawkins, Chairman, State Board of Administration. (Seal.)

[fols. 63-64]

Non-Producing Leases on Arkansas Riverbed Made by the Kansas State Board of Administration and Executive Council, Which Have Expired. (As of Aug. 23, 1944).

Description	County	Acreage	Date	Lessee	Rentals Amt. Collected
S½ 20—N½ 29 T. 20-10	Rice	140	8 -8-41	Vickers Pet. Company	$140 yearly
N½ 3 T. 22-8 N½ 4 T. 22-8	Rice) ")	112.72	6- 8-36	Continental Oil Co.	$112.72 "
Btn. W. line 20-20-10 and S. line 2&3 T. 20-10	"	836.78	3-26-34	Gulf Oil Company	$836.78 "
Btn. N. line Sec. 1&2 T. 21-15 and S. line 10 T. 21-15	Pawnee	149.	10- 8-30	Derby Oil Company	$149.00 "
Btn. E. line 2 [/1&12] T. 26-20 and S. line 20-21-26	Edwards	230.70	10- 8-30	Derby Oil Company	$230.70 "
Btn. E. line 1&12 T. 20-14 and S. line 36 T. 20-15	Barton	488.40	6-17-30	Derby Oil Company	$488.40 "
Btn. W. line 13&24 T. 23-6 and E. line 24&25 T. 23-6	Reno	94.20	5-16-38	C. E. Penrod	$ 94.20 "
Btn. W. line 14&23 T. 23-6 and E. line 14&23 T. 23-6	Reno	55.80	5-16-38	C. E. Penrod	$ 55.80 "
Btn. E. line 22&27 T. 27-21 and W. line 28&33 T. 27-21	Ford	149.20	9- 1-37	B. F. Tomlin	$149.20 "
Btn. E. line 32 T. 27-22 and W. line 31 T. 27-22	Ford	123.40	9- 1-37	B. F. Tomlin	$123.40 "

Non-Producing Leases on Arkansas Riverbed Made by the Kansas State Board of Administration and Executive Council, Which Have Expired. (As of Aug. 23, 1944).

Description	County	Acreage	Date	Lessee	Rentals Amt. Collected
33&34 T. 27–4	Ford	122.	9- 1-37	B. F. Tomlin	$122.00 "
NW¼ (ex. SE¼) 15 T. 32–4	Cowley	70.	8-24-39	Kan.-Okla. Oil & Gas Co.	$ 70.00 (1 yr. only)
34&35 T. 28–1	Sedgwick	73.	7- 1-37	H. A. Keuneke	$ 73.00
30-31-32 T. 21–8	Rice	151.90	"	"	$151.90
1-2-3-11 T. 29–1	Sedgwick	128.10	"	"	$128.10
25-26 T. 21–9	Rice	100.51	"	"	$100.51
18-19-20 T. 21–9	"	108.20	"	"	$108.20
1-2 T. 22–8	"	89.50	"	"	$ 89.50
8–9 & E½ 16 T. 34–3	Cowley	319.35	"	"	$319.35
6-7-8 T. 22–7	Reno	140.20	"	"	$140.20
S½ 35&36 T. 25–2 and N½ 1-2 T. 26–2	Sedgwick	476.69	6-28-37	Phillips Pet. Company	$476.69
22-23 T. 34–3	Cowley	63.20	9-24-37	Chester Westfall	$ 63.20
15 T. 34–3	"	41.40	4-29-40	W. M. McKnab	$ 41.40
SE¼ 29 T. 20–10	Rice	54.90	12-19-41	Paul W. Fleeger	$ 54.90
Btn. E. line T. 24–36 and W. line 11 T. 25–37	Kearny	500.20	1-10-38	Standard Oil & Gas Co.	$500.20

* Matter in Brackets, struck out in copy.

[fol. 65] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed December 21, 1944

The Court makes and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

This action is brought by the United States by the Attorney General at the request of the Secretary of the Interior in behalf of and as guardian of the restricted Indians hereinafter mentioned.

II

The defendant Champlin Refining Company is a corporation organized under the laws of the State of New Mexico, authorized to do business and doing business in the State of Oklahoma, and was duly served with process. The State of Oklahoma, on relation of the Commissioners of the Land Office, was permitted to intervene.

III

Chain of Title to the Arkansas River Bed at the Places in Question

(a) The United States of America originally acquired title to the land involved in this proceeding as a part of the Louisiana Purchase in 1803.

(b) In accordance with the treaties of May 6, 1828, (7 Stat. 311), February 14, 1833, (7 Stat. 414), and December 29, 1835 (7 Stat. 478), the United States conveyed to the Cherokee Nation, by deed dated December 31, 1938, a large tract of land in Northern Oklahoma, including the land on both sides and the bed of the Arkansas River at the locations in suit.

(c) By treaty of July 19, 1866 (14 Stat. 799), the Cherokee Nation agreed that the United States might settle friendly Indians upon that part of their lands known as the Cherokee Outlet. The Sixteenth Article of the treaty provided that the lands were to be conveyed to the friendly In-

dians located thereon and required that the districts on which each group of Indians should be located be in compact form and the boundaries distinctly marked.

[fol. 66] (d) By treaty between the United States and the Cheyenne and Arapahoe Indians, dated October 28, 1867 (15 Stat. 593), there was set aside for them out of the Cherokee Outlet, a reservation extending from the Arkansas River to the Cimarron River. By the terms of this treaty, the reservation for the Cheyenne and Arapahoe Indians was expressly extended to the middle of the Arkansas River. The Cheyenne and Arapahoe Indians decided not to go upon this land and an agreement was obtained from them relinquishing their claim. H. R. Ex. Doc. No. 89, 47th Congress, 1st sess.

(e) Pursuant to the treaty of 1866, Congress by Statute of June 5, 1872 (17 Stat. 228), authorized the Cherokee Nation to convey to the Osage Nation a tract of land described as:

"Bounded * * * on the south and west by the north line of the Creek Country and the main channel of the Arkansas River * * *."

(f) In accordance with the treaty of 1866 with the Cherokee Nation and pursuant to authority contained in the Act of March 3, 1881 (21 Stat. 380), the Secretary of the Interior, on the 25th day of June, 1881, designated and assigned for the use and occupation of the confederated Otoe and Missouria Tribe of Indians:

"That portion of tp. 23 N., R. 3 E., lying West of the Arkansas River (and other townships not involved in this suit)."

(g) Pursuant to the treaty of 1866 with the Cherokee Nation and pursuant to the authority granted by the Act of March 3, 1883 (22 Stat. 603, 624), the Cherokee Nation, on the 14th day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Otoe and Missouria Indians:

Fractional township 23 North, Range 3 East of the Indian Meridian (lying and being on the right bank of the Arkansas

River, according to the plat annexed) (and other townships not included in this suit).

[fol. 67] (h) By the Act of April 10, 1876 (19 Stat. 28), there was set aside as a reservation for the use and occupation of the Pawnee Tribe of Indians:

All that tract of country between the Cimarron and Arkansas Rivers embraced within the limits of Township 23 North of Range 3 East (together with other townships) of the Indian Meridian,

provided that the terms of the Sixteenth Article of the Cherokee Treaty of 1866 were to be complied with so far as applicable.

(i) In accordance with the treaty of 1866 with the Cherokee Nation and pursuant to the authority contained in the Act of March 3, 1883 (22 Stat. 603, 624), the Cherokee Nation, on the 14th day of June, 1883, did grant, bargain, sell, remise, release, relinquish and confirm to the United States of America in trust for the use and benefit of the Pawnee Tribe of Indians:

Fractional township 23 North, Range 4 East of the Indian Meridian (and other townships not involved in this suit) the fractional townships being on the right bank of the Arkansas River.

IV

Title of the Riparian Restricted Indian Patents

(a) On October 9, 1893, a trust patent was issued covering the following described land:

Southeast Quarter of Northwest Quarter and Lots 1, 2 and 3, of Section 19, Township 23 North, Range 4 East of the Indian Meridian in Oklahoma, containing 121.66 acres, and title is now held in trust by the United States for the Indians in the proportionate interests set opposite their names:

Arthur Fields	13/16
Anna Barker	1/16
Jennie Davis	1/16
Lena Brown	1/16

(b) On October 9, 1893, a trust patent was issued covering the following described land:

Lot 6 and Southwest Quarter of Southeast Quarter of [fol. 68] Section 17, Township 23 North, Range 4 East of the Indian Meridian,

and title is now held in trust by the United States for the heirs in the proportionate interests set opposite their names:

Edward Bayhylle	3/84
Daniel Bayhylle	14/84
Violet Bayhylle	14/84
William R. Bayhylle	14/84
Louis D. Bayhylle	14/84
Elmer Bayhylle	14/84
Perry W. Moore	3/84
Lucille M. Moore	3/84

(c) On November 24, 1906, a trust patent was issued covering the following described land:

Lot 5 of Section 24, Township 23 North, Range 3 East of the Indian Meridian in Oklahoma,

and title is now held in trust by the United States for the following named Indian:

Ethel Lewis Barnes.

(d) On June 10, 1907, a trust patent was issued covering the following described land:

Lot 6 of Section 24, Township 23 North, Range 3 East of the Indian Meridian in Oklahoma,

and title is now held in trust by the United States of America for the Indians in the proportionate interests set opposite their names:

Pearl Robedeaux	9/36
Mary Robedeaux	9/36
Naomi Robedeaux	9/36
William Burgess	3/36
Dewey W. Daily	1/36
Esther Burgess	1/36
Earl Burgess	1/36
Lucy Burgess	1/36
Annie Burgess	1/36
Curtis F. Burgess	1/36

[fol. 69] All of the foregoing real estate was issued to each allottee by a trust patent as authorized by Section 5 of the Act of February 8, 1887 (24 Stat. 388), which provided that the United States would hold the allotments in trust for twenty-five years for the use and benefit of the respective allottees and their heirs. Under authority contained in Section 5 of the Act of February 8, 1887, by Executive Orders, the trust periods have been extended and the United States continues to hold the lands allotted in trust for the foregoing named restricted Indians. All of such lands are situated on the south bank of the Arkansas River.

V

In all of such reservations, grants and conveyances the bed of the Arkansas River itself was neither expressly included or excluded from the lands set aside for the Indians.

VI

The land along the Arkansas River on both sides of the river at the location in question was first surveyed into sections, townships and ranges in September, 1872, and such survey approved by the General Land Office on September 16, 1872.

VII

The Arkansas River, at the points in question in this litigation and set at all times herein material, is not navigable in fact.

VIII

On November 16, 1907, the State of Oklahoma was admitted to the Union, and on March 10, 1914, the Supreme Court of the State of Oklahoma, in State v. Nolegs, 40 Okl. 479, took judicial notice of the fact that the Arkansas River is navigable throughout the State and held that the bed thereof is the property of the State of Oklahoma.

IX

On May 28, 1919, the State of Oklahoma enacted a statute, 64 O.S.A., Section 290, by which it was declared that the beds of rivers within the state two chains or more in width are the property of the state. The Arkansas River, at the [fol. 70] locations involved in this action, is more than two chains in width.

X

On July 20, 1942, the State of Oklahoma executed two oil and gas mining leases in favor of Champlin Refining Company covering respectively 281 acres and 157 acres on the south half of the river bed adjoining the Indian allotments in this action. The Champlin Refining Company has drilled a well upon one of said leases and is now producing oil in commercial quantities therefrom.

XI

Ownership of the Arkansas River Bed in Kansas

On April 6, 1912, in Hurst v. Dana, 86 Kan. 947, the Supreme Court of Kansas took judicial notice that the Arkansas River is navigable within that state and held that the bed of the river is the property of the state. The State of Kansas has executed many oil and gas leases covering the river bed. Producing wells have been drilled on such leases and the state has collected all of the rentals and royalties due the lessor thereunder. The title of the State of Kansas to the riverbed has not been questioned by the United States or otherwise. While Hurst v. Dana did not reach the Supreme Court of the United States, a similar conclusion by the Supreme Court of Kansas with respect to the Kansas river, in the case of State v. Akers, 92 Kan. 169, decided on May 18, 1914, was approved by the Supreme Court of the United States in Wear v. Kansas, 245 U. S. 154.

Conclusions of Law

A preliminary statement will indicate the reason for conclusions reached.

Plaintiff relies upon the case of United States v. Brewer-Elliott Oil and Gas Company, 260 U. S. 77. That case involved title to the north half of the bed of the Arkansas River at the approximate point on the stream where we are now concerned with the south half. In that case the United States asserted that title was in the Osage Nation to the main channel of the stream. The Osage Nation having derived title to its reservation from the Act of Congress [fol. 71] of June 5, 1872, wherein the tract conveyed was described as:

"Bounded • • • on the south and west by the north line of the Creek country and the main channel of the Arkansas river • • •."

It was held in that case that the Arkansas River at the point in suit was not navigable in fact and that since the Osage Nation acquired title to the main channel of the stream by an express grant of the United States some thirty-five years prior to the admission of the State of Oklahoma into the Union, that the grantee could not be deprived of its title to such portion of the river bed by a decision of the Supreme Court of the State of Oklahoma declaring the river navigable although non-navigable in fact. It was further held that since the case involved the validity and effect of a grant made by the United States, a federal question was necessarily presented and the navigability of the stream was not a local question for the state tribunals to settle.

But the Brewer-Elliott case may readily be distinguished from the case at bar. At page 89 of the opinion, Mr. Chief Justice Taft says:

"In government patents containing no words showing purpose to define riparian rights, the intention to abide the state law is inferred."

The portion of the river bed involved in this case was not expressly included in the patents issued by the United States. The trust patents issued by the United States under consideration in this case disclose no purpose to define riparian rights which requires a conclusion that the United States assented to their construction according to the local law. The Brewer-Elliott case, supra, citing with approval Wear v. Kansas, 245 U. S. 154, 62 L. Ed. 214, expressly sanctions the practice of some states of retaining title to the beds of streams by adjudging them to be navigable when they are not actually so. The last paragraph of the Brewer-Elliott opinion, on page 89, reads as follows:

"Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not [fol. 72] actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river granted and vesting before statehood, depends for its validity on non-navigability of the stream in fact. In such a case, navigability vel non is not a local question. In Wear v. Kansas, 245 U. S. 154, upon which the appellants

rely, the patent of the United States under which Wear derived title was a grant, made before statehood, of land bordering on the Kansas River without restriction, reservation or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on a navigable stream did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a non-navigable stream, was immaterial. In either view the result there would have been the same. The case of Donnelly v. United States, 228 U. S. 243, is to be similarly distinguished, if, indeed, it can be said after the qualification of the opinion, 228 U. S. 708, 711, to require distinguishing."

It is further urged by the United States that it holds title in trust for its Indian wards and it could not be deprived of such title by determination of navigability by a state court without regard to the fact. If the United States claimed title to the river bed for its own benefit, this would undoubtedly be true. The same question would then be presented that was before the court in United States v. Oregon, 295 U. S. 2, 79 L. Ed. 127, and United States v. Utah, 283 U. S. 64, 75 L. Ed. 849. Absent abandonment by the United States, title to the river bed determined in accordance with the federal law would be in the United States because the river is non-navigable in fact. United States v. Oregon, United States v. Utah, supra. But the United States here urges that its Indian wards have beneficial title to the bed of the stream as riparian owners under the trust patents issued to such Indian wards by the United States. How- [fol. 73] ever, in answer to that, in Oklahoma v. Texas, 258 U. S. 574, the court, at page 594, says:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what it intended. If by treaty or statute or the terms of its patent it has

shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that intention will be controlling; and if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. Where it is disposing of tribal land of Indians under their guardianship the same rules apply." (emphasis supplied.)

The parties herein have filed a stipulation in this case to the effect that the defendant, Champlin Refining Company, and the intervener, State of Oklahoma, will not assert the judgment entered in this case to be res adjudicata of any future action which may or might be brought by the United States of America for its own benefit claiming title in the United States as distinguished from the title of the United States for the benefit of the restricted Indian wards. In view of this stipulation, it cannot be said that the United States claims title to the river bed in this case, except for and on behalf of its Indian wards.

In United States v. Oklahoma Gas & Electric Co., 318 U. S. 206, at page 209, the court said:

"It is well setled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the state where the land lies."

The above statement by the Supreme Court compel- a conclusion that the United States of America intended that its [fol. 74] Indian wards abide by the state law in the measurement of their rights as riparian owners.

It has been suggested that the rights of the riparian owners must be determined in accordance with the local law at the time the trust patents were issued to the Indian allottees; that such patents having been issued prior to statehood the rule of property established by the decision of the Supreme Court of Oklahoma in State v. Nolegs, supra, cannot deprive riparian owners of title to the river bed vesting prior to statehood.

The answer to this contention may be found in Wear v. Kansas, supra. In that case, the patent of the United States under which the riparian owners derived title was a grant made before statehood of land along the shore of the Kansas River. The decision of the Supreme Court of Kansas that title to the river bed was in the State of Kansas was affirmed. The state court took judicial notice of the navigability of the river and refused to hear evidence thereon. Wear v. Kansas appears to be indistinguishable from the case at bar.

I

This Court has jurisdiction of the parties to this suit, including the intervener, State of Oklahoma, and to the subject matter herein.

II

The State of Oklahoma has the sovereign right of defining the riparian titles of private owners to the beds of its rivers, which may be limited to the ownership of the shore and may accomplish this result by declaring its rivers to be navigable, excepting only where title to the river bed has been expressly conveyed by the United States prior to statehood. The determination of these rights is a local question and the federal court must construe such rights in accordance with state law. The decision announced by the Supreme Court of the State of Oklahoma in State v. Nolegs, 40 Okl. 479, is the binding and controlling rule of law in this case.

[fol. 75] III

The State of Oklahoma is the legal title owner of the tracts of land described as:

South Half of the Arkansas river bed at the points in question,

and the Champlin Refining Company has a valid and subsisting oil and gas lease upon such premises and such title held in the State of Oklahoma and in Champlin Refining Company is in all things confirmed and approved.

IV

The United States of America in behalf of its restricted Indian Allottees and their heirs has no right, title or interest in and to the South Half of the Arkansas River bed

at the points in question and their claim to title is hereby denied.

Counsel for defendant and intervener will present to the Court form of decree for entry of judgment on December 29, 1944.

Dated this 21st day of December, 1944.

Royce H. Savage, United States, District Judge.

[File endorsement omitted.]

In United States District Court

Decree—Filed December 29, 1944

On this 29th day of December, 1944, the said cause comes on for decree after having been fully tried and submitted, and upon consideration thereof, it is by the Court,

Ordered, Adjudged and Decreed that the State of Oklahoma is the legal title owner of the South Half of the Arkansas river bed adjoining the parcels of land described in the complaint and the Champlin Refining Company has a valid and subsisting oil and gas lease upon such portion of the river bed and such title held in the State of Oklahoma and in Champlin Refining Company is in all things confirmed and approved.

[fol. 76] It is Further Ordered, Adjudged and Decreed that the United States of America on behalf of its restricted Indian allottees and their heirs has no right, title or interest in and to the South Half of the Arkansas river bed adjoining the parcels of land described by the complaint, and their claim of title thereto is hereby denied.

To the said decree, and every part thereof, and to the above findings and orders the plaintiff at the time excepted and said exceptions are allowed.

Royce H. Savage, United States, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY THE UNITED STATES—Filed March 17, 1945

Notice is hereby given that the United States of America, plaintiff and appellant, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the final judgment and decree entered in this action on December 29, 1944, quieting title to those portions of the Arkansas River bed here involved in the State of Oklahoma, adjudging that defendant Champlin Refining Company has a valid lease upon such portions of the river bed, and decreeing that the United States, in behalf of its restricted Indian allottees and their heirs, has no right, title or interest in such portions of the river bed.

The following parties are appellees:

Champlin Refining Company, a New Mexico corporation.

State of Oklahoma, ex rel. Commissioners of the Land Office.

Whit Y. Mauzy, United States Attorney in and for the Northern District of Oklahoma.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES DISTRICT COURT

ORDER GRANTING AND EXTENDING TIME FOR DOCKETING AND LODGING RECORD ON APPEAL—Filed April 17, 1945

Now on this 17th day of April, 1945, this Motion coming on for hearing for an order extending time in which to allow the United States of America, Appellant in the above entitled case, to docket and lodge the record on appeal in this case in the United States Circuit Court for the Tenth Judicial Circuit, and the Court being fully advised in the premises, finds that said Motion should be, and the same is hereby allowed.

Wherefore, It Is Ordered, Adjudged and Decreed that the plaintiff herein and Appellant, United States of America, be allowed ninety (90) days additional time from March 17, 1945, in which to lodge and docket the record on appeal in this case.

Royce H. Savage, United States, District Judge.

This is to certify that on the 17th day of April, 1945, I deposited in the United States Post Office at Tulsa, Oklahoma, an envelope addressed to each of the following named attorneys appearing and representing the defendant and intervener herein, which envelope each contained a copy of the within and foregoing Order Granting and Extending Time for Docketing and Lodging Record on Appeal filed herein, each envelope being under the postage frank of the Department of Justice:

Mr. Nathan Scarritt, Attorney at Law, Champlin Refining Company, Enid, Oklahoma.

The Attorney General, State of Oklahoma, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Mr. Walter Marlin, Secretary, Oklahoma School Land Commission, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Wm. Knight Powers, Assistant United States Attorney, 335 Federal Building, Tulsa 3, Oklahoma.

[File endorsement omitted.]

[fol. 78] IN UNITED STATES DISTRICT COURT

ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS—Filed April 17, 1945

Upon motion of the United States of America, and good cause therefor appearing,

It is hereby Ordered that the Clerk of this Court transmit to the United States Circuit Court of Appeals for the Tenth Circuit, together with the transcript of record on appeal herein, the original exhibits offered or received in evidence on behalf of all parties to this cause, together with pleading exhibits with instructions to the Clerk of said Circuit Court of Appeals to return said original exhibits to this Court upon rendition of final decision in the cause.

Royce H. Savage, United States, District Judge.

This is to certify that on the 17th day of April, 1945, I deposited in the United States Post Office at Tulsa, Oklahoma, an envelope addressed to each of the following named attorneys appearing and representing the defendant and intervener herein, which envelopes each contained a copy

of the within and foregoing Order for Transmittal of Original Exhibits, each envelope being under the postage frank of the Department of Justice:

Mr. Nathan Scarritt, Attorney at Law, Champlin Refining Company, Enid, Oklahoma.

The Attorney General, State of Oklahoma, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Mr. Walter Marlin, Secretary, Oklahoma School Land Commissioner, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Wm. Knight Powers, Assistant United States Attorney, 335 Federal Building, Tulsa 3, Oklahoma.

[File endorsement omitted.]

[fol. 79] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD ON APPEAL—Filed April 17, 1945

Pursuant to Rule 75(a), Federal Rules of Civil Procedure, the United States of America, appellant herein, hereby designates the following matters to be included in the record on appeal:

(1) Complaint, filed July 13, 1943.

(2) Disclaimer of Champlin Refining Company, an Iowa corporation, filed August 5, 1943.

(3) Answer of Champlin Refining Company, a New Mexico corporation, filed August 5, 1943.

(4) Motion to intervene and intervening answer of State of Oklahoma, ex rel. Commissioners of the Land Office, both filed August 20, 1943.

(5) Order dated August 20, 1943, granting leave to intervene to the State of Oklahoma, ex rel. Commissioners of the Land Office.

(5a) Transcript of proceedings at pre-trial conference on October 15, 1943.

(6) Amendment to answer of defendant Champlin Refining Company dated, October 15, 1943.

(7) Amendment to intervening answer of State of Oklahoma, ex rel. Commissioners of the Land Office, filed October 22, 1943.

(8) Motion of the United States for summary judgment filed November 19, 1943, with attached affidavit, but excluding the plat hereinafter designated as Plaintiff's Exhibit 21, also excluding the opinion, order, and decree of the district court in the case of United States of America v. Brewer-Elliott Oil & Gas Co., No. 75 Equity, which plat, opinion, order, and decree are included in the record on appeal as Plaintiff's Original Exhibits 21, 22, 23, 24.

(9) Affidavit in support of motion for summary judgment, filed December 2, 1943.

(10) Stipulation filed June 26, 1944.

(11) Order overruling plaintiff's motion for summary judgment, filed August 8, 1944.

[fol. 80] (12) Plaintiff's requested findings of fact and conclusions of law, filed September 5, 1944.

(13) Entire transcript of trial proceedings had on September 16, 1944.

(14) Stipulation filed September 16, 1944, to the effect that plaintiff has introduced evidence showing Arkansas River is non-navigable, etc.

(15) Stipulation filed September 16, 1944, re drilling operations of defendant Champlin Refining Company, with attached exhibits.

(16) Findings of fact and conclusions of law filed December 21, 1944.

(17) Decree entered December 29, 1944.

(18) Copy of notice of appeal filed March 17, 1945.

(19) Statement of points on which appellant intends to rely.

(20) All entries appearing on the clerk's docket relating to this proceeding.

(21) Order extending time for docketing record.

(22) Order re original exhibits.

(23) Copy of this designation.

J. Edward Williams, Acting Head, Lands Division. —— ——, United States Attorney, Tulsa, Oklahoma. Vernon L. Wilkinson, Fred W. Smith, Attorneys, Department of Justice.

This is to certify that on the 17th day of April, 1945, I deposited in the United States Post Office at Tulsa, Oklahoma, an envelope addressed to each of the following named attorneys appearing and representing the defendant and intervener herein, which envelopes each contained a copy [fol. 81] of the within and foregoing Designation of Record on Appeal, each envelope being under the postage frank of the Department of Justice:

Mr. Nathan Scarritt, Attorney at Law, Champlin Refining Company, Enid, Oklahoma.

The Attorney General, State of Oklahoma, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Mr. Walter Marlin, Secretary, Oklahoma School Land Commission, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Wm. Knight Powers, Assistant United States Attorney, 335 Federal Building, Tulsa 3, Oklahoma.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS RELIED ON—Filed April 17, 1945

The United States of America, appellant, pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, makes the following statement of points on which it will rely on appeal.

(1) The trial court erred in decreeing that the State of Oklahoma is the owner of legal title to the south half of the bed of the Arkansas River adjoining the parcels of land described in the complaint of the United States.

(2) The trial court erred in decreeing that the defendant Champlin Refining Company has a valid and subsisting oil and gas lease on the portions of the south half of the Arkansas River bed adjoining the parcels of land described in the complaint of the United States.

(3) The trial court erred in decreeing that the United States, on behalf of its restricted Indian allottees and their heirs, has no right, title or interest in and to the south half

of the Arkansas River bed adjoining the parcels of land described by the complaint filed by the United States.

[fol. 82] (4) The trial court erred in concluding that the decision of the Supreme Court of Oklahoma in State v. Nolegs, 40 Okla. 479, to the effect that the Arkansas River is navigable, is binding and controlling on the United States and on the federal district court in this proceeding.

(5) The claim of the State of Oklahoma rests solely upon a contention that the Arkansas River was navigable and that the bed of the river passed to the State as a result of the Act of Congress admitting Oklahoma to the Union; therefore the question of navigability is a federal question, and the trial court erred in holding that it is a state question controlled either by a State judicial determination of navigability or by a State legislative declaration of ownership of river beds.

(6) The patents by the United States to its restricted Indian allottees having been issued prior to statehood, the trial court erred in concluding that the scope of the grants under such patents could be changed by later State judicial determinations or State legislative declarations of navigability, the river being in fact non-navigable at the points in question and at all times here material.

(7) The Arkansas River being nan-navigable in fact at the points in question and at all times material, the trial court erred in not holding that the State of Oklahoma acquired no title to the bed of the Arkansas River upon its admission to the Union.

(8) The Arkansas River being non-navigable in fact at the points in question and at all times here material, the trial court erred in not holding that the trust patents covering the parcels of land described in the complaint embrace the south half of the Arkansas River bed adjoining the parcels in question.

(9) The trial court erred in concluding that the applicable principles of law in cases where the United States claims title in trust for its restricted Indian allottees and their heirs are different than the principles of law applicable in cases where the United States claims title for itself, and erred specifically in holding that in the former class of cases the question of navigability is a state question and

[fol. 83] that the United States Government and federal courts are concluded by a State judicial determination of navigability in a proceeding to which the United States was not a party, or by State statutory declarations of ownership of river beds.

(10) The trial court erred in not holding that the decree in the case of United States v. Brewer-Elliott Oil and Gas Co., No. 75 Equity, District Court of the United States for the Western District of Oklahoma, 249 Fed. 609, is res judicata and binding on the State of Oklahoma and its privy, Champlin Oil Company, and that said decree finally and conclusively determined that the State of Oklahoma has no title to the portions of the Arkansas River bed here in issue.

(11) The trial court erred in denying the motion of the United States for summary judgment.

(12) The trial court erred in not quieting title in the portions of the Arkansas River bed here involved in the United States and its allottees, and in not granting the injunctive relief prayed for by the United States.

J. Edward Williams, Acting Head, Lands Division, Department of Justice; —— ——, United States Attorney, Tulsa, Oklahoma; Vernon L. Wilkinson, Fred W. Smith, Attorneys, Department of Justice, Washington, D. C.

This is to certify that on the 17th day of April, 1945, I deposited in the United States Post Office at Tulsa, Oklahoma, an envelope addressed to each of the following named attorneys appearing and representing the defendant and intervener herein, which envelopes each contained a copy of the within and foregoing Statement of Points Relied On, each envelope being under the postage frank of the Department of Justice:

[fol. 84] Mr. Nathan Scarritt, Attorney at Law, Champlin Refining Company, Enid, Oklahoma.

The Attorney General, State of Oklahoma, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Mr. Walter Marlin, Secretary, Oklahoma School Land Commission, Oklahoma State Capitol, Oklahoma City, Oklahoma.

Wm. Knight Powers, Assistant United States Attorney, 335 Federal Building, Tulsa 3, Oklahoma.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS ON PRE-TRIAL CONFERENCE—Filed April 23, 1945

Be It Remembered that on the 15th day of October, A. D., 1943, in the above-named Court, before the Honorable Royce H. Savage, United States District Judge, the above-styled cause came on regularly for Pre-Trial Conference.

Appearances: Whit Y. Mauzy, Esq., U. S. Attorney, and Wm. Powers, Esq., Asst. U. S. Attorney, Attorneys and Counselors at Law, Tulsa, Oklahoma, For the Plaintiff. Nathan Scarritt, Esq., and E. S. Champlin, Esq., Attorneys and Counselors at Law, Enid, Oklahoma, For the Defendant. J. Walker Field, Esq., Asst. Atty. Gen., and Walter Marlin, Esq., Law and Executive Counsel, Commissioners of the Land Office, Attorneys and Counselors at Law, Oklahoma City, Oklahoma, For the Intervener, State of Oklahoma.

Both sides having announced "ready to proceed", the following proceedings were had, to-wit:

The Court: You may offer the evidence.

[fol. 85] Mr. Powers: We wish to offer in evidence, if Your Honor please, Government's Exhibit A, which is an allotment to William Bayhylle of a portion of Section 17, Range — or Township 23, North, Range 4 East. An allotment deed to Horace Field, as Government's Exhibit 2, which is a portion of Lots in Section 19, Township 23 North, Range 4 East. An allotment deed to Ethel Barnes, which is a portion of Lots in Section 24, Township 23 North, Range 4 East, as Government's Exhibit 3. And Anna Robedeaux, which is a portion of the lands in Section 24, Township 23, Range 3 East, as Government's Exhibit 4.

We thought at first that the Emma Pearson land was included, but upon a check of the lands we found that they did not include it. I have another deed to Anna Robedeaux which I believe is not riparian land.

I believe that's all.

The Court: Do the defendants agree that these allotment deeds may be received in evidence at this time?

Mr. Scarritt: No objection.

The Court: They will be considered in evidence. Anything further, Mr. Powers?

Mr. Powers: Not that we wish to prove at this time except as to the degree of heirship in these cases. We can cover that in the stipulation. I don't care to introduce it in evidence.

The Court: Do you suppose you can dictate a stipulation here into the record now that the parties can agree upon?

Mr. Powers: You can follow those with that map—those allotment deeds.

Mr. Scarritt: Well, now, would the stipulation be any different than the allegations in your petition as to the heirship?

Mr. Powers: No, sir.

Mr. Scarritt: If we agree on it, we had as well just admit the allegations as to heirship in the petition are correct.

[fol. 86] Mr. Powers: And save all the stipulation, yes, sir.

The Court: Well, what about the Intervener, State of Oklahoma? Are you willing to make that agreement?

Mr. Field: We have no information to the contrary and if he would tell us that these proofs establish that fact why——

Mr. Powers: I have these proofs here. It would take considerable amount of time to introduce them into the record. If you would like to examine them personally——

Mr. Field: That is what I was thinking. We could make that stipulation and give us an opportunity before we leave to look them over. I have no reason to believe that they do not correspond to the allottees, and of course I do not question an adjudication by the Secretary if he made it as to this allotment.

Mr. Scarritt: Mr. Marlin makes the suggestion he believes they should be in the record. So far as the bulk of the rec-

ord goes, if it ever comes to printing it, or transcribing it, then we can decide whether they should be taken out, or not. But I cannot see that there would be any damage in putting them in the record—just a mere matter of introduction.

The Court: All right.

Mr. Powers: We offer in evidence, if Your Honor please, Government's Exhibit 5, which is a letter dated June 25, 1881, from the Secretary of Interior to the Commissioner of Indian Affairs, which designates, sets aside the real estate concerned herein as a portion of the Otoe Reservation, withholding a portion of fractional township 23 North, Range 3 East, lying west of the Arkansas River containing 14,098.84 acres. I think you all probably have a similar exhibit.

Government's Exhibit 6 we offer in evidence, the deed between the Cherokee Nation and the Pawnee Tribe of Indians, conveying certain real estate under date of the 14th day of June, 1883, together with a plat of the Pawnee grant. Would you like to see this grant?

We offer in evidence Government's Exhibit 7, which is a certified copy of the original deed made by and between [fol. 87] the Cherokee Tribe of Indians, and the United States of America, in trust for the use and benefit of the Otoe and Missouria Indians under date of June 14, 1883, together with plat showing designated Missouria and Otoe reservations.

We offer in evidence Government's Exhibit No. 8, same being proceedings in the heirship of the estate of William Bayhylle; also containing an order determining heirs of Elijah Bayhylle; also order determining heirs of Katie Bayhylle. Now that is the heirship proceedings in the Bayhylle tract.

We offer in evidence Government's Exhibit No. 9, certified copy of proceedings of the Department of Interior, to determine the heirs of Anna Robedeaux, together with certified copy of the Order Determining Heirs of Belle Daily, formerly Belle Burgess. This is the Robedeaux tract.

If Your Honor please, you might—I might inquire of Your Honor—here you will notice that I have put together and introduced in these exhibits, tacked together——

Mr. Scarritt: The heirships pertaining to different tracts.

Mr. Powers: Yes, different hearings on different individuals, all heirs, all pertaining to the same tract.

This is Government's Exhibit No. 10. I offer in evidence certified copy of the findings of the Department of Interior, approval of heirship, estate of Horace Fields, together with certified copy, records of the Department of the Interior, showing a deed by and between Eva R. Weeks, grantor, as the heir of Horace Fields, to Arthur Fields, a Pawnee Indian, grantee, together with finding and approval of heirship of the Department of the Interior of the Estate of Eva R. Weeks.

Mr. Marlin: Examination of these instruments shows a number of things contained therein about treaties and grants that will be material; that's the reason I think it the better policy to have them regularly introduced.

Mr. Powers: With the purpose to show that the restric-[fol. 88] tions continued as to various Indians contained herein, it will be necessary to show, and offer in evidence, orders made by the various presidents of the United States extending the restrictions as to such Indians.

The Court: That will be true, unless it can be agreed upon.

Mr. Powers: May it be agreed upon by you gentlemen?

The Court: That the Indians who own these several tracts, that the restrictions on the alienation of the tracts involved here have been extended from time to time by various proclamations of the President of the United States.

Mr. Powers: So that they are now restricted Indians.

Mr. Scarritt: Your Honor, I don't doubt but that is true. However, the exhibits are here already, and I wouldn't see any reason that they should not just be placed in evidence.

The Court: All right.

Mr. Powers: I offer in evidence Government's Exhibit No. 11, which is an executive order of President Coolidge under date of August 11, 1925, extending restrictions of the Indians of the Otoe Reservation.

I offer in evidence Government's Exhibit No. 12, executive Order signed by President Herbert Hoover, under date of September 29, 1931, extending the trust period on allotments of Indians of the Otoe and Missouria tribes of Indians.

I offer in evidence Government's Exhibit 13, same being an executive order of president Herbert Hoover, under date of December 30, 1931, extending the trust period on allotments to the Otoe and Missouria Indians.

I offer in evidence Government's Exhibit No. 14, same being an executive order signed by Franklin D. Roosevelt under date of December 20, 1934, extending restrictions to the Otoe Reservation.

I offer in evidence Government's Exhibit No. 15, same being the executive order of Woodrow Wilson, dated March 2, 1918, extending the trust period on the allotments of the Pawnee Tribe of Indians.

[fol. 89] I offer in evidence Government's Exhibit No. 16, same being an executive order signed by President Calvin Coolidge under date of May 29, 1928, extending the restrictions and trust periods of certain allotments of certain Pawnee Indians in the State of Oklahoma.

I offer in evidence Government's Exhibit No. 17, same being an executive order executed by Franklin Delano Roosevelt, under date of September 29, 1937, extending the periods of trust applying to Indian lands generally. This was a general order; didn't apply to any particular tribe.

I offer in evidence Government's Exhibit No. 18, same being an executive order signed by Franklin Delano Roosevelt under date of October 29, 1940, extending the periods of trust applying to Indian lands which would expire in the year 1941.

I offer in evidence Government's Exhibit 19, same being an executive order of Franklin Delano Roosevelt extending the trust period on Indian lands expiring during the calendar year 1942.

I believe that's all.

The Court: May it be agreed, then, that Government's Exhibits 5 to 19 inclusive may be received in evidence at this time without objection on the part of the parties?

Mr. Marlin: Yes, sir.

Mr. Scarritt: Yes, sir.

Mr. Powers: I would like the record to show, if Your Honor please, that in reference to certain exhibits, as to the heirship proceedings, that they are introduced in groups, pertaining to individual allotment tracts concerned in this litigation.

The Court: In other words, you have grouped together as one exhibit——

Mr. Powers: Yes.

The Court: The various heirship proceedings pertaining to one particular tract of land.

Mr. Powers: That is correct.

[fol. 90] Mr. Marlin: Your Honor, may I ask if there is some way by which we can get a photostatic copy of these exhibits?

Mr. Powers: I have no objection at all. Now, there are three of those exhibits which I had planned to attach to a motion in this proceeding. But I had been unable to prepare the exhibits myself. We made up four of these maps and plats which I furnished you this morning—had those made for your use, as well as ours; but I have been unable to get copies of these. They are made on a "ply-film" paper, and I don't know much about that kind of business; I have been unable to get photostat copies of them.

Mr. Marlin: May I ask you if any of those maps or plats are drawn to scale, or would be considered in any way for the purpose of establishing the meander line?

Mr. Powers: No, they are not on such a scale as would show a meander line, I don't think.

Mr. Scarritt: Just off the record; you mean the photostat company says they won't make good copies?

Mr. Powers: No, I talked to the U. S. Geological survey, who prepared that plat there for me, and these others are a little different type.

Mr. Scarritt: I was going to say, we have taken some in our office of about that same——

Mr. Powers: I don't know what you could do with those.

Mr. Scarritt: I think they would take all right.

The Court: Is that all you care to do?

Mr. Powers: That's all the exhibits I care to offer at the present time. I might say this for the purpose of this motion, which will be a motion for summary judgment, that is, a motion on the pleadings; I assume under the statement of counsel this morning that that more or less is their idea of disposition of the case too, without proof. That I would like to have those exhibits withdrawn for the purpose of the motion, but inasmuch as they are in the record I don't see any point in withdrawing them again for that motion.

[fol. 91] The Court: I think your motion for summary judgment may refer to any of the exhibits that have been received in evidence here this morning. It may be considered as having connection with the motion for summary judgment filed by either side.

Do you have some exhibits you want to offer?

Mr. Scarritt: If Your Honor please I might state our theory of the case, if Your Honor would bear with me a moment on that.

The Court: All right.

Mr. Scarritt: We regard this case as merely a question of land titles and boundaries. The law is so well settled by decisions of the Supreme Court from our earliest times up to now that I think there can be no question about the law, which apparently is that when new states were carved out of the public domain that they were entitled to all of the rights and privileges of the thirteen original states; and one of those rights or privileges which was enjoyed by the thirteen original states was the ownership of the beds of the navigable rivers. I think one of the first cases that came up was when Alabama was admitted to the Union. An exhaustive opinion was written as to whether Alabama could acquire title to the navigable rivers and the Court held she could. From that time on it has been an unbroken line of decisions, and it has been the rule that a new state was entitled to the beds of their navigable rivers, and as a corollary to that, that such a state could declare the navigability of their rivers, and that the rights of riparian owners, even through Government patents, would be controlled by the local law, which was pronounced either in the state statutes, or in the state decisions. There is one exception to this rule, and that is that where the United States had legitimately sold and conveyed the beds of the rivers to some other party prior to statehood. So it appears to us that it is—that the law in this case is settled, and merely the question to be decided is the fact whether this portion of the bed of the Arkansas River was sold to some other party prior to statehood or whether it was part of the public domain of the United States at the time Oklahoma entered as a state. If it was a part of the public domain when [fol. 92] Oklahoma entered as a state, then we have no doubt whatever that the bed passed to Oklahoma when it became a state, and the right to declare its navigability passed to Oklahoma when it became a state. If the Government can prove that the United States sold this bed of the river to some Indian Tribe who held it at the time Oklahoma became a state, then of course the Brewer-Elliott decision would apply, and the title would of course belong to the Indian tribe, and the State would not have the right to declare

navigability or the right of riparian owners. In the *Brwer*-Elliott case, the north half of this river had been sold to the Osage tribe, and was owned by the Osage tribe at the time Oklahoma became a state. That being a treaty in which the United States was a party, the United States reserved to itself the right to decide whether the river was navigable, and the right to determine the title to the river bed as a Federal question. If we can show that on the other hand that the south half of the river was a part of the public domain of the United States at the time Oklahoma became a state, then the decisions are unbroken to the effect that it is a question of state law, to be governed by state statutes or state decisions.

Now, that being the case, we would like also to trace title of this portion of the river bed, but we would like to go back just a little farther than the Government did. For the convenience of the Court we have brought a map here which was prepared by Mr. George Rainey, who is an Indian student of some note. The original of this map hangs on the wall of the State Library in Oklahoma City; and it was very helpful, we found to us in making this out. I might just lay it on Your Honor's desk here.

I don't know whether this is necessary for the record or not. We are going to introduce exhibits to prove everything that I have to say. I might just say in brief, this portion in blue was the original grant to the Cherokees in about 1838, including these various colored items which were sold to other tribes later by the Cherokees. In about 1866 it became apparent that the Cherokees were not going to need a great portion of this original tract; and the United States made a treaty with the Cherokees that they could settle friendly Indians on any of these lands which the United States might choose. I think the United States started negotiations with the Pawnees in about 1876, and [fol. 93] set aside the reservation shown here in red for them. However, the actual deed from the Cherokees to the United States, and in trust for the Pawnees, was not made until about 1883.

Mr. Powers: The same date as the Otoe tribe.

Mr. Scarritt: Yes, and the same year, reservation was set aside to the Otoe and Missourias; and the Cherokees deeded the Otoes and Missourias the tract shown here in yellow.

Now, the exhibits which the defendants will introduce and some of which have already been introduced in evidence by the Government, will show that the Act of Congress, the treaties and the deeds themselves by which these reservations were set aside and conveyed to the Pawnees, and the Otoes, were explicit in excluding the river bed, and the river bed did not pass to the Otoes, Missourias or the Pawnees, thus leaving the river bed in the Cherokees. The Pawnees later quit-claimed their entire reservation to the United States, and the Cherokees also issued a deed to the United States covering their entire interest in what is known as the Cherokee Outlet, bounded on the east by the 96th Meridian, on the west by the 100th Meridian, including this strip shown here, which was inclusive of anything that they had retained in the Otoe and Missouri, and Pawnee reservations. And since one of the things which they had retained was the bed of the river, by that act this bed of the river passed to the United States as part of the public domain, and it remained in the United States at the time of the opening, and at the time of the admission of Oklahoma as a state; and that being the case, the river bed passed to Oklahoma, and the right to declare the navigability passed to Oklahoma.

Now, for the defendant's exhibits—might we first ask whether it could be stipulated as to the original conveyance from the United States to the Cherokee Tribe, and I will quote from the Brewer-Elliott decision in the District Court, in which the Court said, "The United States conveyed, pursuant to the agreements and treaties, to the Cherokee Nation in December, 1838, a tract of land which included the lands on both banks of the Arkansas River, and the land [fol. 94] under it." Might we have a stipulation that that is a correct statement of the title at that time?

Mr. Powers: That is not, as a matter of fact, the conveyance. That is that court's interpretation of the conveyance.

Mr. Scarritt: That is correct; that is just a statement of it.

Mr. Powers: I don't see there would be any point making a stipulation to it. It would be a question of this court construing what that conveyance did cover, whether it covered the bed of the river, or not.

Mr. Scarritt: Very well, we will introduce the treaty, then.

I have here Kappler's Indian Affairs, Laws and Treaties, which is a compilation by Mr. Kappler, who was formerly Clerk, I believe of the Senate Committee on Indian Affairs for many years. I think the work is regarded as an authoritative compilation of Indian affairs and treaties. All these exhibits are copied from that book. The book is here for the inspection of Government counsel.

We wish to offer in evidence now, treaty with the Cherokees in 1866, by which the Cherokees agreed that any friendly Indian tribes might be settled upon the territory which was ceded to them by the United States in 1838, as Defendant's Exhibit 2.

Mr. Powers: Does that exhibit cover only Section 16 of that treaty; is that all?

Mr. Scarritt: Yes, it covers the portion which is applicable to this case, that's right.

Mr. Powers: You have it as Article 15; and we have a further article of that treaty which is Article 16, which reads as follows: United States can settle friendly Indians in any part of the Cherokee country west of 96 degrees, to be taken in compact form, in quantity not exceeding 160 acres for each member of each of said tribes therein to be settled, the boundaries of said districts to be distinctly marked, the land taken in fee simple to each of said tribes [fol. 95] to be held in common or by members in severalty as the United States may decide." Now, is that a portion of yours?

Mr. Scarritt: No, that is not.

Mr. Powers: Is your treaty under date of July 19, 1866?

Mr. Scarritt: That is correct.

Mr. Powers: That is Article 16. That must be the succeeding article to the one which you have, Mr. Scarritt.

Mr. Scarritt: Uh huh.

Mr. Powers: I wonder then if we would be permitted to make a copy similar to yours and introduce it as Article 16 of the same treaty then?

Mr. Scarritt: Yes, absolutely.

Our next exhibit in chronological order, Your Honor, is that portion of the Act of Congress of April 10, 1876, by which Congress set aside certain territory within the Cherokee Outlet for the Pawnee Tribe of Indians, as this was the Pawnees only, and in which they describe or reserve all that tract of country between the Cimarron and Arkansas

Rivers embraced within certain townships and ranges which are involved in this case, as Defendant's Exhibit 3.

Our next exhibit is that portion of the Act of March 3, 1881, in which it was indicated that the Otoe and Missouria tribes of Indians should be moved from the States of Kansas and Nebraska to reservations which should be purchased by the United States for their benefit within the State of Oklahoma, as Defendant's Exhibit 4.

Our next exhibit, the letter of the Secretary of the Interior, dated June 25, 1881, setting forth the Otoe and Missouria reservations, has already been introduced by the Government. This letter states the exact number of acres which is contained in the reservation in Township 23 North, Range 3 East, wherein these words are used: "Lying west of the Arkansas River, the exact number of acres, 14,098.84 acres is the number of acres in that township, which was set aside for the Otoes. That has already been introduced by the Government.

The Court: All right.

[fol. 96] Mr. Scarritt: Our next exhibit is that portion of the Act of the 47th Congress of 1883, appropriating the sum of $300,000 out of the treasury to purchase from the Cherokee Nation lands west of the Arkansas River, in trust for the Pawnees, Otoes and Missourias. Your Honor will notice they again use the term "west of the river". Defendant's Exhibit 5.

Our next exhibit is the deed from the Cherokee Nation to the United States in trust for the Otoes, dated June 14, 1883. This exhibit has already been introduced by the Government. However, we have a photostat of the original treaty, whereas the Government's is a typewritten copy. And I believe for that reason I should introduce it. The language of this deed is note-worthy. Bearing in mind that our township and range which we are interested in is 23 North, 3 East, the deed reads that it covers fractional township 23 North, Range 3 East of the Indian Meridian lying and being on the right bank of the Arkansas River. And this deed shows that the total number of acreage in all of the reservation is 129,113.2 acres, which is the same acreage which is set forth in the letter of the Secretary of the Interior, setting aside the reservation. As defendant's Exhibit 6.

I next wish to introduce Your Honor, original government survey of township 23 North, Range 4 East, and

would like permission to withdraw the original since it does not belong to us, and substitute photostatic copy. This is the Government survey dated September 16, 1872. Defendant's Exhibit 7.

Mr. Powers: Is this Range 4 East?

Mr. Scarritt: That's right. This original Government survey shows the original description of the lands which are involved in this case, and shows that they do not extend into the river, but are on the river bank.

We now wish to introduce an original Government survey dated September 16, 1872, covering Township 23 North, Range 3 East, and wish to ask permission to withdraw the original and substitute a photostatic copy. As Defendant's Exhibit 8.

This survey shows the land involved in this case in [fol. 97] Township 23 North, 3 East, shows that the Arkansas River's meander was not surveyed, and that the river land- involved in this case do not extend into the river, but stop at the river bank.

We now have an affidavit of Roy G. Collier, civil engineer for the Champlin Refining Company, which states that he has carefully computed the acreage shown on the exhibit which I have just introduced, and that that portion of township 23 North, range 3 East lying west of the Arkansas River, as shown on the said Government survey contains 14,099.24 acres. This does not include any of the riverbed, and is within a fraction of the amount—a fraction of an acre of the amount which the Secretary of the Interior stated was set aside for the Otoes. Which shows by computation of acreage it was not intended that the Otoes should receive any of the riverbed.

Mr. Powers: Is this computation based on the present banks of the river or the banks of the river as shown on the plats at that time?

Mr. Scarritt: Shown on the acreage figures as shown on the original Government survey.

Mr. Powers: This is made not in accordance with the present river banks, but by the survey.

The Court: It is a computation of the acreage made on the basis of the Government survey which is the previous exhibit offered.

Mr. Scarritt: In other words, the Secretary of the Interior, by the exhibit introduced, a certain amount of acreage of this particular township was set aside for the Otoes.

This exhibit shows that that amount of acreage would exclude the river. Defendant's Exhibit 9.

We now wish to introduce treaty between the Pawnee tribe, and the United States, dated November 23, 1892, by which the Pawnee tribe ceded back to the United States all of their claim and interest in and to the reservation which had previously been set aside for them. This treaty, like the act which set the reservation aside for them, described the country as being between the Cimarron and Arkansas Rivers. Defendant's Exhibit 10.

[fol. 98] Mr. Powers: Do you have a copy of that treaty, Mr. Scarritt?

Mr. Scarritt: Yes. We next wish to introduce Act of Congress of March 3, 1893, by which Congress appropriated the sum of $80,000 to purchase from the Pawnee Tribe the land which was described in the preceding exhibit. This Act states that the lands acquired by the agreement specified in this Act are hereby declared to be a part of the public domain. Defendant's Exhibit 11.

We next wish to introduce a treaty between the Cherokee Nation and the United States dated December 19, 1891, by which the Cherokee Nation ceded to the United States all of its right, title and interest in and to any and all lands which they might have in the so-called Cherokee Outlet which is bounded on the west by the 100th Meridian, on the north by the State of Kansas, on the east by the 96th Meridian, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe reservations. This includes the bed of the Arkansas River which is involved in this case. Defendant's Exhibit 12.

We now wish to introduce that portion of the Act of Congress of March 3, 1893, by which the sum of $295,736 was appropriated for the purchase from the Cherokee Nation of the lands in the Cherokee Outlet which are referred to in the previous exhibit, as Defendant's Exhibit 13.

We now wish to introduce proclamation of the President of the United States, dated August 19, 1893, in which he declared all of the lands purchased from the Cherokees, and from the Pawnees in the Cherokee outlet as a part of the public domain of the United States, as Defendant's Exhibit 14. And this proclamation of the United States—of the President of the United States sets forth very briefly the title of these various portions of that outlet as we understand it.

"Now, therefore, I, Grover Cleveland, President of the——

The Court: I don't believe you need to read that, Mr. Scarritt. Just let the exhibit go in.

Mr. Scarritt: All right. I just might point out, for Your [fol. 99] Honor's convenience, a reference that the President declared this to be public domain of the United States, but excepted from the public domain the part that had been deeded to the Osages, and in doing that, he was careful to say that the Osage country was bounded by the main channel of the Arkansas River, which the Supreme Court says means the middle line. But when he gets to the Otoes he says the line—he says, the lands lying west of the Arkansas River, which are included in fractional township 23 North, Range 3 East, which is a distinction which should be borne in mind, in our opinion, throughout this entire case. And as to the Pawnee tribe, lands, he makes no exception whatsoever.

I should have done this earlier, Your Honor. We have prepared an amendment to our answer, and shown a copy to the Government counsel, which we would like permission at this time to file. We raise anew defense in this amendment. The amendment states briefly that this same river involved in this case runs into the State of Kansas; and that the Supreme Court of the United States has declared that the State of Kansas has the right to declare any rivers in her boundaries are navigable and that according to such rule, the State of Kansas has, by her own State Supreme Court, declared the Arkansas River to be navigable. It has always been recognized to belong to the State, and to apply any different rule to the State of Oklahoma than has always been applied to the State of Kansas would violate the rights of these defendants under the equal-protection-of-the-law clause of the Constitution of the United States.

The Court: The amendment may be filed.

Mr. Field: May I, at this time, ask permission of the State on behalf of the School land Commission to file a similar amendment within five days?

The Court: Yes, sir.

Mr. Scarritt: Now, in keeping with this amendment, we wish to offer a certificate from Phil R. Hawkins, Chairman of the Board of Administration of the State of Kansas, to the effect that he is the official that has custody of all the

records of the State of Kansas relevant to oil and gas leases [fol. 100] covering the bed of the Arkansas River; that the State of Kansas has issued many oil and gas leases covering the bed of said river, naming the counties in which such leases are located, and further certifying that production of oil and gas has been obtained from such leases, naming the companies which have obtained such production; and that the State of Kansas has at all times received all oil and gas royalties and rentals from the lands described in the certificate lying and being in the bed of the Arkansas River. As Defendant's Exhibit 15.

Mr. Powers: I don't think it is competent, if Your Honor please, here, and object to its introduction.

The Court: Just a minute; let it be marked as an Exhibit so we will know what we are talking about. Make a notation of the number. We will rule on it later. Make a notation of any exhibits you want to object to, and make the record when we get through with the offer. Is that all?

Mr. Scarritt: That's all we have to offer at this time.

The Court: Now, do I understand that the Government offers no objection to the introduction of any of these exhibits at this time?

Mr. Powers: I assume they are correct, Your Honor.

The Court: At this time, except that you do object to Exhibit 15, upon the ground that it is not material to any issue in the case; is that right?

Mr. Powers: That's correct.

The Court: I assume that in making your objection to Exhibit 15, you don't base it on the fact that the proof sought to be—the fact sought to be established, by the affidavit——

Mr. Powers: Yes, if Your Honor please.

The Court: Rather than in the form of an affidavit?

Mr. Powers: If Your Honor please, but this exhibit purports to show that certain lands are within the limits of the bed of the Arkansas River within the State of Kansas, which there is no showing that this board is such that he [fol. 101] could properly describe, or ascertain whether or not such lands were within the bed of the Arkansas River. I think it is incompetent; I think it is immaterial. I think there is no predicate shown for its admission, as to its proof of correction.

The Court: Of course that type of proof cannot be made by affidavit in the event you object to it being made in that fashion. Of course I would have to sustain your objection.

Mr. Scarritt: We can go to Topeka and take his *deposition*, or have the party here to testify.

The Court: Or have the party here to testify. That is the reason I wanted to know if your objection is based solely upon the question of materiality.

Mr. Scarritt: As to qualification, the affiant states he is Chairman of the Board of Administration which has complete charge and custody of all oil and gas leases of the State of Kansas covering the bed of the Arkansas River. I think on depositions he wouldn't have to say anything more, perhaps, to make his testimony admissible.

The Court: I would suggest this: If you care to make any investigation to determine whether the facts sworn to in the affidavit are true and correct, you might do that. And if you find that the facts are as stated in the affidavit, then you could limit your objection to the question of materiality, and that would obviate the necessity of taking depositions.

Mr. Powers: I am familiar enough with the rule of Wier versus Kansas that the bed of the Arkansas River throughout the length and breadth of the State of Kansas has been ruled and held to be so by the Supreme Court of the United States, but—probably upon deposition that same statement would be made. So I will just reserve my objection to its competency and materiality.

The Court: You object to the exhibit solely upon the theory it is not material to any issue in the case.

Mr. Powers: That is correct.

The Court: I will overrule that objection. I may at a later date conclude that it is not material. If I do, of course [fol. 102] it won't be considered. But for the present I will overrule the objection.

Mr. Powers: Exception.

Mr. Scarritt: Your Honor, I want to make one statement: That all exhibits which have been offered were offered by both Champlin Refining Company, and the State of Oklahoma.

The Court: Yes, all right, I understand that. As I understand you, Mr. Powers, you propose to file a motion for summary judgment upon behalf of the Government.

Mr. Powers: If Your Honor please, that was prior—prior to hearing the statement of counsel this morning. I still think that that would be my inclination, but I would like to, at this time, if you will allow us, to discuss back and forth and see if I have correctly caught his theory as he stated his lawsuit. In the beginning, I believe you made the statement that the navigability or non-navigability of the river, so far as the theory of their lawsuit is concerned, is immaterial.

Mr. Scarritt: No, I didn't make any such statement.

Mr. Powers: You claim the title to the real estate was by reason of the delineation of the actual grants to those various tribes of Indians which surrendered their grants being on the west bank of the Arkansas River; that the bed of the river has never been granted, but was still in the public domain, is that correct?

Mr. Scarritt: That much is correct.

Mr. Powers: What was your statement with reference to the navigability?

Mr. Scarritt: Our statement with reference to navigability was merely that we could offer no proof as to navigability since in our theory of the case that has been conclusively settled by the decision of the State v. Nolegs.

Mr. Powers: Well, I see. Well, under that statement, we will proceed, then, if Your Honor please, to file motion for summary judgment, I believe, at which time the Court can dispose of certain legal aspects of the case which we [fol. 103] think are controlling. It might be that of course at a later date that if we were overruled in our motion for summary judgment it would be necessary to offer proof as to the navigability of the river, depending on the court's consideration of the effect of State versus Nolegs decision.

The Court: Am I to understand that there will be no evidence offered by the defendants to controvert the facts which are sought to be established by the plaintiff by the introduction of these exhibits that have been introduced here this morning; and further, that there will be no evidence offered by the Government to controvert the facts sought to be established by the defendant and the intervener as a result of these exhibits introduced here this morning?

Mr. Scarritt: That's right.

The Court: The purpose of introducing the exhibits at this time on the pre-trial hearing is to get into the record the formal proof necessary to be put into the record by the

parties and about which there will be no disputed controversies so far as the facts are concerned.

Mr. Scarritt: Your Honor, I have overlooked one matter here. I think as we are relying upon the law as proclaimed in the State v. Nolegs as a rule of property of the State, that we should have a stipulation that that decision, as it appears in 40 Oklahoma 479, 139 Pacific 943, should be considered as evidence in this case.

The Court: You will agree to that?

Mr. Powers: Yes. At the same time I will have a request concerning the decision and decree in the Brewer-Elliott decision in the 75 Equity, and also the order of the Court which made the facts set up in the written opinion the findings of fact of the Court.

Mr. Scarritt: That is agreeable.

Mr. Powers: It is taken from the transcript.

Mr. Scarritt: That is agreeable.

The Court: That is agreeable.

Mr. Scarritt: Then, I have one other request to support [fol. 104] the amendment which has been introduced this morning, that the decision of the Supreme Court of Kansas in Hurst v. Dana, 86 Kansas 947, 122 Pacific 1041, be considered as part of the evidence in this case, that being the decision in which the State of Kansas recognized and declared that the Arkansas River was navigable throughout its limits, within the State of Kansas.

The Court: May that be agreed, Mr. Powers?

In view of your statement that the facts as disclosed by the various exhibits introduced today at the pre-trial hearing will not be controverted by either side, I assume that those exhibits may be taken into consideration by the Court in connection with any motion for summary judgment that may be filed either by the plaintiff or by the defendants. Is that correct?

In the absence of a suggestion by one or the other of the parties that they propose to file a motion for summary judgment, I would expect to try to work out some agreement about a date for trial of the case. But since I do understand that you have been directed, Mr. Powers, by the Department of Justice to file a motion for summary judgment, I think that should be disposed of before the case is set for trial. And in that connection I suggest that in the first place that you file your motion as soon as possible, and, secondly, that when you do file your motion that you

present to the court a memorandum brief in support of it, and of course serve a copy of that brief upon the defendant and the intervener. And I should like then for the defendant and intervener—I will just refer to the intervener as defendant also because you are in the same position—file an answer brief within a reasonable time after that brief is served on you, and I suspect we had better agree on the amount of time that you will need to respond to that brief.

Mr. Scarritt: Well, I would like to say, in that connection, we would like to make the brief very thorough and complete because there is no reason why we should not discuss the entire law question at that time. And we would like sufficient time in order to do that.

[fol. 105] The Court: That is what I should like for you to do. Of course there is, conceivably, a possibility that decision on the motion for summary judgment would dispose of the lawsuit as far as this court is concerned; and, even if it does not, disposition of that motion will be followed within a short time thereafter by a trial, and it will be very helpful to the court in the trial of the case to have the matter thoroughly briefed and consider it before trial. So, I am expecting you in presenting these briefs to go into it thoroughly.

Mr. Powers: If Your Honor please, we have drawn a motion for summary judgment along certain lines, but there has arisen this morning one or two items which the motion for summary judgment is not directed toward. A little novel matter; It has a little twist on the whole situation. It is a little bit different from the attack we have taken upon it. It might be that it will be necessary for us to amplify again our motion for summary judgment, and direct our proof towards another phase of the lawsuit; so I would like to ask the Court to be a bit more indulgent with me in the filing of the motion, and the brief to accompany it. The brief we have now is about half written, and the motion is all prepared; but it has taken a little bit different tack this morning.

The Court: Of course it will take you some time perhaps to prepare your motion. And since I have requested you to file a brief at the time you file your motion, it will take even more time to prepare your brief, I am sure. So my only suggestion is that you do that as soon as possible.

Mr. Powers: Well——

Mr. Marlin: Let me remind Your Honor, too, that we are at a little disadvantage, the State, in Oklahoma City, and chief counsel who is really carrying the law in this case. We feel we ought to render some assistance to him in the matter, and give us an opportunity to get together. So, whatever time you give, I wish you would take into consideration the fact that we don't live in the same town.

The Court: What time will you suggest? I will give you whatever time you think necessary; and if the time allowed doesn't prove to be sufficient, I will give you a little more.

[fol. 106] Mr. Marlin: I think we should have about thirty days.

The Court: Then that will be the order, that you will have thirty days to file your response to the motion for summary judgment, and your brief.

Mr. Scarritt: And it will be the understanding that if we find we can't do it in that time, that we might have an extension.

The Court: And of course you are always at liberty to ask the court for an extension of time.

Mr. Scarritt: Then there is only one other matter and that is as to the photostats. We would like to have photostats of the Government's Exhibits if we might. We have a photostating machine in our office.

The Court: Suppose we have an understanding that the reporter may deliver to you the Government's Exhibits for the purpose of enabling you to have photostatic copies made.

Mr. Scarritt: We would be glad to do that.

The Court: And you return them to the Reporter as soon as you have them.

Mr. Powers: It is no more expense, Mr. Scarritt, to make two photostat copies rather than one; those are all the copies I have, too.

Mr. Scarritt: No, we would be glad to—well, there is a little more expense. We will be glad to make them for you, though.

The Court: There is more expense, but you will be willing to accommodate the Government by doing that. All right.

* * * * * * *

(The reporter has been furnished a typewritten copy of a portion of "Treaty with the Western Cherokee, May 6, 1828, 7 Stats. 311," designated by counsel for defendants

as Defendant's Exhibit 1 copied from Kappler-Indian Affairs Laws and Treaties, Vol. II, page 288.)

[fol. 107] Reporter's Certificate to foregoing transcript omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF TRIAL PROCEEDINGS—Filed April 23, 1945

Be It Remembered that on the 16th day of September, A. D., 1944, in the above-named Court, before the Honorable Royce H. Savage, United States District Judge, the above-styled and numbered cause came on regularly for trial.

Appearances: Whit Y. Mauzy, Esq., U. S. Attorney, and Wm. K. Powers, Esq., Asst. U. S. Attorney, Attorneys and Counselors at Law, For the United States of America. J. Walker Field, Esq., Assistant Attorney General, State of Oklahoma, For defendant, Champlin Refining Company, and intervener, State of Oklahoma.

All parties, thus represented, having announced "ready for trial", the following proceedings were had and done, to-wit:

[fol. 108] The Court: The United States versus Champlin Refining Company.

Mr. Powers: If Your Honor please, on an early date in August, this Court had for consideration a motion for summary judgment, of the plaintiff, denied the same, and set the case for hearing on this date. It has been set previously on other dates, and, in an effort to accommodate Mr. Scarritt, we finally arrived at this date. And now I am advised by Mr. Field, who represents the State of Oklahoma, that Mr. Scarritt is engaged in the trial of a lawsuit that commenced yesterday at noon, and it will be impossible for him to be here.

We have entered into a stipulation which is now being prepared by my stenographer, in reference to deleting a word. The essence of the stipulation is as follows—I believe I—as a matter of fact, I can give you the exact wording of that stipulation—do you have a copy of that stipulation

we prepared in reference to the navigability of the river, Mr. Field? At any rate, this stipulation is to the effect that it shall be considered that the United States of America has introduced evidence showing that the river at the place and points in question, and at the time in question, was non-navigable in fact, and that the defendant has introduced no evidence of said fact, but that the defendant has objected to the introduction of such evidence for the reason that—further reason that it is immaterial, due to the matter of law decided in the No Legs case; and, a second portion of the stipulation is that it shall be considered for the purposes of this lawsuit that the meander line as shown on the survey is the high-water mark on the south half of the river bed at the place in question for the purpose of determining the limit of the land in question in this proceeding.

That stipulation has been entered into by the parties, and, consequently, due to that, there will be no requirement for any introduction of evidence as to the navigability of the river.

Now then, I would like to re-offer in evidence in the trial the nineteen exhibits which were introduced by the plaintiff at the pre-trial hearing and to have the record show that [fol. 109] those nineteen exhibits introduced by the plaintiff at the time of the pre-trial hearing shall be considered introduced in evidence in this proceeding as of this date.

The Court: Yes.

Mr. Field: Likewise, all exhibits introduced by the defendants and interveners may also be considered by the Court here.

The Court: I assume there is no objection to that.

Mr. Powers: No objection.

The Court: Let all the exhibits—those exhibits admitted by the court which were offered by the plaintiff, as well as those offered by the defendant, will be considered in evidence in the trial of this case.

Mr. Powers: And I have one additional exhibit, if Your Honor please, which is Plaintiff's Exhibit No. 20, which is Article 2 of the Treaty with Cheyenne and Arapahoe Indians concluded October 28, 1867, 15 Stat. 593. This Article 2 simply outlines the tract of land which the Cheyenne and Arapahoe Indians were to occupy, lying west of the Osage allotment and it describes it as the east boundary, down the middle of the main channel of the Arkansas River. We wish to offer that in evidence.

The Court: The exhibit may be admitted.

Mr. Field: No objection.

Mr. Powers: Now, if Your Honor please, in addition to that, we have heretofore filed a motion for summary judgment, which has been denied by the court, and I don't know whether, as a matter of fact it will be considered by the Court upon appeal, but for the purposes of this appeal I would like to offer in evidence the exhibits attached to our Motion for Summary Judgment, as follows: Exhibit B is this map showing the restricted allotments which we had, and the tracts of land which are leased by the Champlin Refining Company.

The Court: Let me make this suggestion, Mr. Powers: That the exhibits attached to the Motion for Summary [fol. 110] Judgment, which you may now desire to offer, be marked in numerical order with the other exhibits.

Mr. Powers: Yes, sir.

The Court: Already offered in evidence.

Mr. Powers: I wondered—there was this about it: I wondered if we could mark the——

Mr. Field: Aren't those the same as introduced at the trial?

Mr. Powers: Yes, they were introduced.

Mark this exhibit, which is Exhibit B on Plaintiff's Motion for Summary Judgment, as Plaintiff's Exhibit No. 21.

The Court: Yes.

Mr. Powers: Plaintiff's Exhibit C, which is the copy of the opinion of the District Court in the Brewer Elliott case, as Plaintiff's Exhibit No. 22.

The Court: Is that a published opinion?

Mr. Powers: Yes, it is a published opinion. I do that for this reason: There is a succeeding order of the Court which is Plaintiff's Exhibit D to my motion, which was an order of the Court making the opinion the findings of fact in that case. "It is this day ordered that the findings as contained in the written opinion filed in the litigation and the final decree in the above-entitled cause, be and the same are adopted as findings of fact by the Court herein. Now, for the purpose of the record it might be wise that—it would not be necessary to take up all this in the record, that is, the opinion, because it is published—a printed opinion.

Mr. Field: Is that the opinion of the Supreme Court of the United States?

Mr. Powers: That is the opinion of the District Court.

The Court: Have your exhibits marked.

Mr. Field: I think the Court will take judicial knowledge of the other opinion that followed that——

[fol. 111] The Court: As well as that one.

Mr. Field: Yes, sir, I don't see the object of introducing it; but we have no objection.

Mr. Powers: I would also like to offer in evidence, if the Court please, the decree—the formal decree in the Brewer Elliott decision in the trial court, which is marked Plaintiff's Exhibit No. 24.

The Court: All right, it may be admitted.

Mr. Powers: Along that line, if Your Honor please, Mr. Field has presented to me a stipulation which I have executed, signed by Mr. Scarritt, and other counsel, which contains therein a photograph of the oil well which the Champlin Refining Company has in the river, and certain facts by Mr. Hawkins, Chairman of the Board of Administration of the State of Kansas in reference to the rental and royalties received from the oil wells producing in the bed of the Arkansas River in the State of Kansas. The stipulation is as follows: That the Champlin Refining Company has drilled a well at the location shown on the attached Exhibit A, which well is now producing oil in commercial quantities. It is further stipulated that a photograph of said well, and that portion of the Arkansas River in which it was drilled, was taken by Dick McConkay on June 17, 1944 from a location on the south bank of the Arkansas River—and that if he were present he would testify that the photograph correctly reveals that. It is further stipulated and agreed that certificates of Mr. Hawkins, Chairman of the Board of Administration, may be introduced in evidence as though the statements therein contained were testified by him in person. Now, the stipulation is entered into with the only objection that I make as to the materiality or competency of such evidence.

The Court: Your objection will be overruled, and I will receive the stipulation. The same order will be made with respect to the other stipulation entered into.

Mr. Powers: Now, if Your Honor please, that disposes of the evidence in the case, I believe.

The Court: Let me ask you: I believe there was a stipulation entered into to the effect that the decision in this case

[fol. 112] could not result that the United States could not bring a separate action to recover title.

Mr. Field: Yes, sir.

Mr. Powers: That is a part of the records of this case; I don't know whether it would have to be introduced in evidence or not. We can't—have you seen that stipulation?

The Court: That is a part of the record; I have seen it; it is a part of the record.

Mr. Powers: Yes, sir, it has been filed.

Mr. Field: Yes, sir, that is a stipulation we had a quarrel over one word in it. We finally ironed that out.

The Court: All right, do you have any evidence?

Mr. Field: I have just to formally present to Your Honor, in case you might want to give us an opportunity to be heard relative to the sufficiency of our findings of fact and conclusions of law and the formal objections to the findings of fact and conclusions of law as presented by them, as to being adopted—in other words, if there is any question in the mind of the court on the final decision as to any portion of the particular findings we requested——

The Court: I haven't—I haven't read your requested findings as yet. Nor the objections to them made by the Government. And I think probably the most satisfactory way to proceed would be for the court to endeavor to prepare the findings and conclusions based on the suggestions that have been submitted, and then I will fix a date for the filing of the findings and conclusions, and the entry of the decree formally in the case. I am going to enter judgment for the defendant in this case, but the judgment will be entered at the time the findings and conclusions are filed in the case, and the decree is signed and filed by the court.

Mr. Field: Well, our suggestions, then, in fact, are a part of the record, and have been filed in the Clerk's office, and likewise his, as I understand it. And, just to complete the file, as far as we are concerned, we would like to file our objections to certain portions of the findings of fact, as suggested by him——

[fol. 113] The Court: Yes, all right, you may do that.

Mr. Field: For your consideration. Then it will be understood that at a later date you will enter your findings of law, and formal judgment, at which time we might each party have an opportunity to take exception to such as we saw fit at that time.

The Court: What I will very likely do, is prepare findings and conclusions, and file them; furnish counsel with a copy and at that time fix a date upon which a decree will be entered, formally, in the matter.

Mr. Powers: And, for your assistance, if Your Honor please, we have not filed formal objections to the requested findings of fact as prepared by the defendant, and I would like to ask of the Court whether you would prefer we would do it prior to the time you make your findings, or after you may make your findings then file our objections?

The Court: Have you prepared requested findings?

Mr. Powers: Yes, we have filed those.

The Court: Well, that is sufficient.

Mr. Powers: We haven't made any specific objections.

The Court: I think an examination of your requested findings will show——

Mr. Powers: Yes, sir—the difference——

The Court: The difference between your idea and what the findings should be.

Mr. Powers: It will.

The Court: That will be sufficient.

Mr. Field: Of course your judgment, of course, will be also in favor of the intervener, as to the rights of the State of Oklahoma in the matter.

The Court: Yes, sir. I believe that's all I have on this docket this morning.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 114] [File endorsement omitted.]

PLAINTIFF'S EXHIBIT A

The United States of America

To all to whom these Presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated July 8, 1893, from the Commissioner of Indian ** acting* Affairs, approved by the Secretary of the Interior July

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* Matter in italics appears as handwritten correction on printed original.

10, 1893 whereby it appears that, under the provisions of the Act of Congress approved February 8, 1887, (24 *Stats February 28, 1891* (26 *Stats. 794) and March 3, 1893 (27 Stat. 644)*
388,) (as amended by the Act of † [Congress of of] William Bayhylle, an Indian of the Pawnee tribe or band, has been allotted the following-described land, viz:

The west half of the northeast quarter of section twenty and the southwest quarter of the southeast quarter and the lot numbered six of section seventeen in Township twenty-three north of Range four east of the Indian Meridian, [fol. 115] Oklahoma Territory containing one hundred and twenty-nine acres.

Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, Hereby Declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said William Bayhylle or, in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I Grover Cleveland, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

[L. S.]
1936992

By the President: Grover Cleveland, By M. McKean, Secretary. L. Q. C. Lamar, Recorder of the General Land Office. (Seal.)

---

† Matter in brackets struck out in copy.

[fol. 116] Department of the Interior, General Land Office

Washington, D. C., Oct. 7, 1942.

I hereby certify that this photograph is a true copy of the patent record which is in my custody in this office.

R. S. Clinton, Chief, Patents Division. (Seal.)

PLAINTIFF'S EXHIBIT 2

No. 28

The United States of America

To all to whom these Presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated July 8, 1893, from the Commissioner of Indian Affairs, **Acting*
approved by the Secretary of the Interior July 10, 1893 whereby it appears that, under the provisions of the Acts of Congress approved February 8, 1887, (24 Stats., 388,) (as amended by the Act of †[Congress of] February 28, 1891 (26 Stat. 794) and March 3, 1893 (27 Stat. 644) or †[Horace] Field, an Indian of the Pawnee tribe or band, has been allotted the following-described land, viz:

The South East quarter of the North West quarter, and the Lots numbered one, two and three of Section nineteen in Township twenty-three North of Range four East of the Indian Meridian, in Oklahoma Territory, containing one hundred and twenty-one acres and sixty-six hundredths of an acre

Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, Hereby Declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth action) for the

---

* Matter in italics appears as handwritten correction on printed original.

† Matter struck out in copy.

period of twenty-five years, in trust for the sole use and benefit of the said Horace Field or —— —— or, in case of [fol. 117] his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this ninth day of October, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

1936992
[L. S.]

By the President: Grover Cleveland, By M. McKean, Secretary. L. Q. C. Lamar, Recorder of the General Land Office. (Seal.)

Department of the Interior, General Land Office

Washington, D. C., Oct. 7, 1942.

I hereby certify that this photograph is a true copy of the patent record which is in my custody in this office.

R. S. Clinton, Chief, Patents Division.

[fol. 118] PLAINTIFF'S EXHIBIT 3

454

The United States of America

To all to whom these Presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior June 1, 1906, whereby it appears that Ethel Lewis Barnes an Indian of the Otoe and Missouria tribe or band has been allotted the following-

described land, the South half and the North East quarter of the South East quarter and the Lot numbered five of Section twenty-four, in Township twenty-three North of Range three East, of Indian Meridian in Oklahoma, containing one hundred and fifty-two acres and twenty hundredths of an acre

Now know ye, that the United States of America, in consideration of the premises, as allotted, and by these presents does allot, unto the said Ethel Lewis Barnes the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law:

Provided, that the President of the United States may, in his discretion, extend said period.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixt.

Given under my hand at the City of Washington, this twenty-fourth day of November, in the year of our Lord [fol. 119] one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

1936992

By the President: T. R. Roosevelt, by F. M. McKean, Secretary. C. H. Brush, Recorder of the General Land Office. (Seal.)

Department of the Interior, General Land Office

Washington, D. C., Oct. 7, 1942.

I hereby certify that this photograph is a true copy of the patent record which is in my custody in this office.

R. S. Clinton, Chief, Patents Division. (Seal.)

PLAINTIFF'S EXHIBIT 4

(Record of Patents)
4-182b-tyr.

The United States of America,

To all to whom these presents shall come, Greeting:
409 A.

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior January 17, 1907, whereby it appears that Anna Robedeaux, an Indian of the Otoe and Missouria tribe or band, has been allotted the following-described land: the West half of the South East quarter and the South East quarter of the South East quarter of Section one, and the South West quarter of the North East quarter of Section thirteen in Township twenty two North of Range one East and the Lot numbered six of Section twenty four in Township twenty three North of Range three East of Indian Meridian in Oklahoma, containing two hundred and five acres and forty five hundredths of an acre.

Now Know Ye, That the United States of America, in [fol. 120] consideration of the premises, has allotted, and by these presents does allot, unto the said Anna Robedeaux the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law: Provided, That the President of the United States may, in his discretion, extend said period.

In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the tenth day of June, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty first
1936992

By the President: Theodore Roosevelt, by F. M. McKean, Secretary. H. W. Sanford, Recorder of the General Land Office. (Seal.)

Department of the Interior, General Land Office

Washington, D. C., Oct. 7, 1942.

I hereby certify that this photograph is a true copy of the patent record which is in my custody in this office.

R. S. Clinton, Chief, Patents Division.

[fol. 121] PLAINTIFF'S EXHIBIT 5

W.J.V. W.H.C.

Department of the Interior

Washington, June 25th, 1881.

The Commissioner of Indian Affairs.

Agreeably to your recommendation of the 13th instant. The following described lands in the Indian Territory west of the 96° west longitude in the tract ceded to the U. S. by the Cherokees for the settlement of friendly Indians, by the 16th Article of their Treaty of July 19, 1866, are hereby designated and assigned for the use and occupation of the Confederated Otoe and Missouria Tribes of Indians under the provisions of the Act of Congress approved March 3, 1881, namely

Tp. 22 N. R. 1 E.	containing	23,013.70	acres
" 23 " " 1	"	23,018.79	"
" 22 " " 2	"	23,049.27	"
" 23 " " 2	"	22,945.91	"
" 22 " " 3	"	22,986.69	"
also that portion of Tp. 23, N. R. 3 E. lying west of the Arkansas River containing		14,098.84	"
Total acreage		129,113.20	"

The papers which accompanied your letter before noted, are herewith returned.

1188, I. O. 1881
1155-1182-1183
1408 and 1485 M. 1881

Ten Enclosures.

Very respectfully, L. I. Kirkwood, Secretary.

7485)
7768)
Int. Dept. 9271) 81
9916)
10407)

June 25—N

[fol. 122] Case No. 95

Designating and assigning with in described lands to Confederated Otoes & Missourias Inds & Rcts paprs (illegible) to same.

See 19754
10 incl
L. B. 83 p. 73

Copy sent to Agents, Noodin and Shorb. June 29-1881.
L. B. 83 p 71.
L 10/238

[Certified]

PLAINTIFF'S EXHIBIT 6

This Indenture, made and entered into this fourteenth day of June A. D. Eighteen-hundred and Eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, in trust for the use and benefit of the Pawnee tribe of Indians of the Second part, Witnesseth; that, Whereas by the Sixteenth Article of the treaty concluded July nineteenth, A. D. Eighteen-hundred and Sixty-six, between said Cherokee Nation and the United States, the said United States acquired the right "to settle friendly Indians on any part of the Cherokee Country west of the

ninety sixth degree" of west longitude, under certain limitations therein mentioned;
and, Whereas by an Act of Congress approved March third, Eighteen-hundred and Eighty-three, three-hundred-thousand dollars ($300,000) was appropriated "to be paid into the treasury of the Cherokee Nation out of funds due under appraisement for Cherokee lands west of the Arkansas River", provided "That the Cherokee Nation through its proper authorities shall execute conveyances satisfactory to the Secretary of the Interior to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages now occupying [fol. 123] said tract as they respectively occupy the same, before the payment of said sum of money", now, Therefore by authority of an Act of the National Council of the Cherokee Nation aforesaid approved May eighth, Eighteen-hundred and Eighty-three, which recites "That Dennis W. Bushyhead Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of the Cherokee Nation, are hereby authorized and empowered, in the name of the Cherokee Nation, to execute deeds of conveyance as required by said Act, (March third, Eighteen-hundred and Eighty-three) for the tracts of Cherokee land for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages, as they respectively occupy the same", said party of the first part, by the aforesaid principal chief and delegates, and in consideration of the payment of the sum of money mentioned in the Act of March third, Eighteen-hundred and Eighty-three, aforesaid, as due under appraisement for Cherokee lands west of the Arkansas River, does by these presents grant, bargain, sell, remise, release, relinquish and confirm unto the said party of the second part, forever, in trust nevertheless and for the use and benefit of the Pawnee tribe of Indians, all those certain tracts of land lying and being in the Indian Territory; embracing the following township and fractional townships north and east of the Indian Meridian, the fractional townships being on the right bank of the Arkansas River:

Township twenty-one (21) and twenty-two (22), and fractional townships twenty-three (23) and twenty-four (24) north, range four (4) east;

Townships twenty-one (21) and twenty-two (22) and fractional townships twenty-three (23) and twenty-four (24) north, range five (5) east;

Township twenty-one (21) and fractional townships twenty-two (22) and twenty-three (23) north, range six (6) east;

Township twenty (20) north, range five (5) east, except lots seven (7), eight (8) nine (9) and ten (10), Section thirty-one (31); lots five (5), six (6), seven (7) and eight (8). Section thirty-two (32); lots five (5), six (6), seven (7), and eight (8), Section thirty-three (33); lots five (5), six (6), seven (7), and eight (8); Section thirty-four (34); lots five (5), six (6), seven (7) and eight (8); Section thirty-[fol. 124] five (35) and lots five (5), six (6), seven (7) and eight (8); Section thirty-six (36) Township twenty (20) north, range six (6) east, except lots seven (7), eight (8), nine (9) and ten (10); Section thirty-one (31); lots five (5), six (6), seven (7) and eight (8); Section thirty-two (32) lots five (5), six (6), seven (7) and eight (8); Section thirty-three (33); lots five (5), six (6), seven (7) and eight (8); Section thirty-four (34); lots five (5), six (6), seven (7), and eight (8); Section thirty-five (35); and lot one (1), section thirty-six (36); except also so much of section thirty-six (36) as lies within the present Creek reservation; According to a plat of said lands hereto annexed, marked "A", and made a part of this conveyance; containing in all two-hundred and thirty-thousand and fourteen and four-hundredths acres (230,014,04) hereby granted: together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining;

To have And to Hold the said premises as above described, with the appurtenances, unto the said party of the second part, for the use and purposes aforesaid.

In Witness Whereof the party of the first part hath subscribed this conveyance by the said principal chief and delegate aforesaid, who have also hereunto set their hands and seals this fourteenth day of June, A. D., Eighteen-hundred and Eighty-three.

The Cherokee Nation, by Dennis W. Bushyhead, LS, Principal Chief and Richard M. Wolfe, LS, Robert B. Ross, LS, Delegates of the Said Cherokee Nation. (Seal.)

Signed, sealed and delivered in the presence of Jos. K. McCammon, N. P. Loveridge, W. A. Phillips.

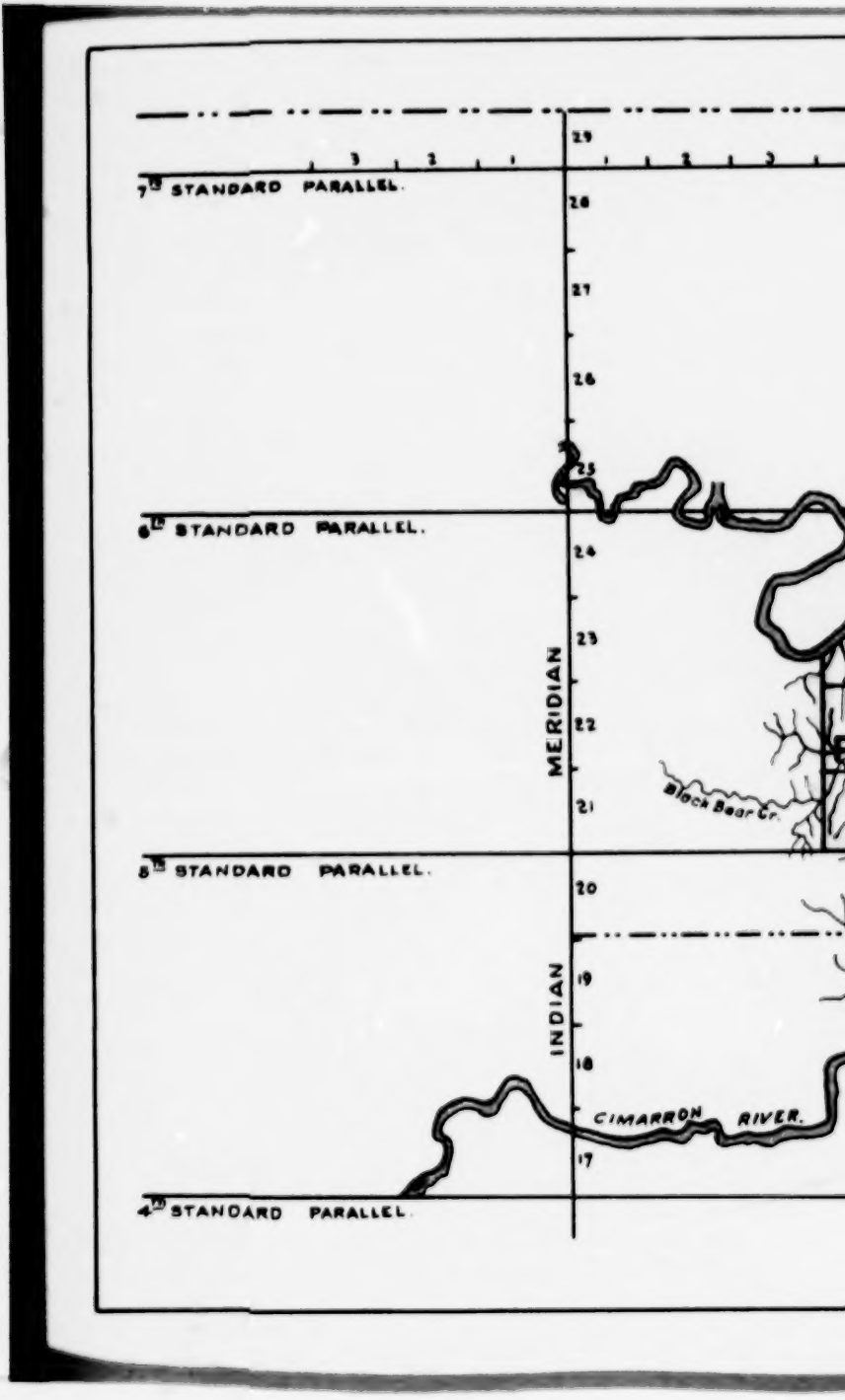
[fols. 125-126] DISTRICT OF COLUMBIA,
County of Washington, ss:

On this fourteenth day of June, A. D., Eighteen-hundred and Eighty-three before me a Notary Public in and for the District aforesaid personally came Dennis W. Bushyhead, Richard M. Wolfe and Robert B. Ross, to me known to be the persons who executed the foregoing instrument and acknowledged the same to be their free act and deed for the purposes and under the authority therein mentioned.

George M. Lockwood, Notary Public. (Seal.)

[Certified.]

(Here follows 1 Photolithograph, side folios 127-128)


7TH STANDARD PARALLEL.
6TH STANDARD PARALLEL.
5TH STANDARD PARALLEL.
4TH STANDARD PARALLEL.
INDIAN MERIDIAN
29
28
27
26
25
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23
22
21
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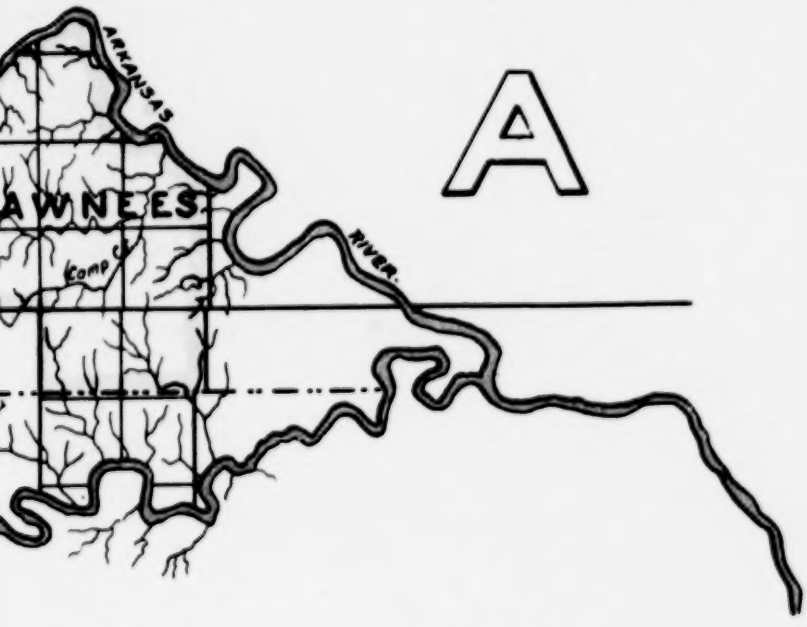
19
18
17
3
2
1
Black Bear Cr.
CIMARRON RIVER.


ARKANSAS
A
RIVER

[fol. 129] PLAINTIFF'S EXHIBIT 7

This Indenture, made and entered into this fourteenth day of June, A. D., Eighteen-hundred and Eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe, and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part and the United States of America, in trust for the use and benefit of the Otoe and Missouria Indians of the second part, Witnesseth: that,

Whereas by the sixteenth article of the treaty concluded July nineteenth, A. D., Eighteen-hundred and sixty-six, between said Cherokee Nation and the United States, the said United States acquired the right "to settle friendly Indians on any part of the Cherokee Country west of the ninety sixth degree" of west longitude, under certain limitations therein mentioned; and,

Whereas by an Act of Congress approved March third, eighteen-hundred and eighty-three, three hundred-thousand dollars ($300,000) was appropriated "to be paid into the treasury of the Cherokee Nation out of funds due under appraisement for Cherokee lands west of the Arkansas river", provided that "the Cherokee Nation through its proper authorities shall execute conveyances satisfactory to the Secretary of the Interior to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages now occupying said tract as they now respectively occupy the same, before the payment of said sum of money": now,

Therefore by authority of an Act of the National Council of the Cherokee Nation aforesaid, approved May eighth, Eighteen-hundred and Eighty-three, which recites "That Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of the Cherokee Nation, are hereby authorized and empowered, in the name of the Cherokee Nation, to execute deeds of conveyances as required by said Act March third, Eighteen-hundred and eighty-three, for the tracts of Cherokee land for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages, as they respectively occupy the same", said party of the first part, by the aforesaid principal chief and delegates, [fol. 130] and in consideration of the payment of the sum of money mentioned in the Act of March third, Eighteen-hundred and eighty-three aforesaid as due under appraisement

for Cherokee lands west of the Arkansas River, does by these presents grant, bargain, sell, remise, release relinquish and confirm unto the said party of the second part, forever, in trust nevertheless, and for the use and benefit of the Otoe and Missouria Indians, all those certain tracts of land lying and being in the Indian Territory, embracing the following townships and fractional township North, and East of the Indian Meridian, viz:

Township twenty-two (22) and twenty-three (23) North, range one (1) East; Townships twenty-two (22) and twenty-three (23) North, range two (2) East; Township twenty-two (22) North, range three (3) East; Fractional township twenty-three (23) North, range three (3) East of the Indian Meridian; lying and being on the right bank of the Arkansas River, according to a plat of said lands hereto annexed, marked "A", and made a part of this conveyance, containing in all one-hundred and twenty-nine-thousand, one hundred and thirteen and twenty-hundredths (129, 113, 20) acres, hereby granted; together with all and singular the hereditaments and appurtenances thereto belonging, or in any wise appertaining;

To Have and To Hold the said premises as above described, with the appurtenances, unto the said party of the second part, for the use and purposes aforesaid.

In Witness Whereof the party of the first part hath subscribed this conveyance by the said principal chief and delegates aforesaid, who have also hereunto set their hands and seals this fourteenth day of June A. D., Eighteen-hundred and Eighty-three.

The Cherokee Nation, by Dennis W. Bushyhead, LS, Principal Chief, and Richard M. Wolfe, LS, Robert B. Ross, LS, Delegates of the said Cherokee Nation. (Seal.)

[fol. 131-132] Signed, sealed and delivered in the presence of Jos. K. McCammon, N. P. Loveridge, W. A. Phillips.

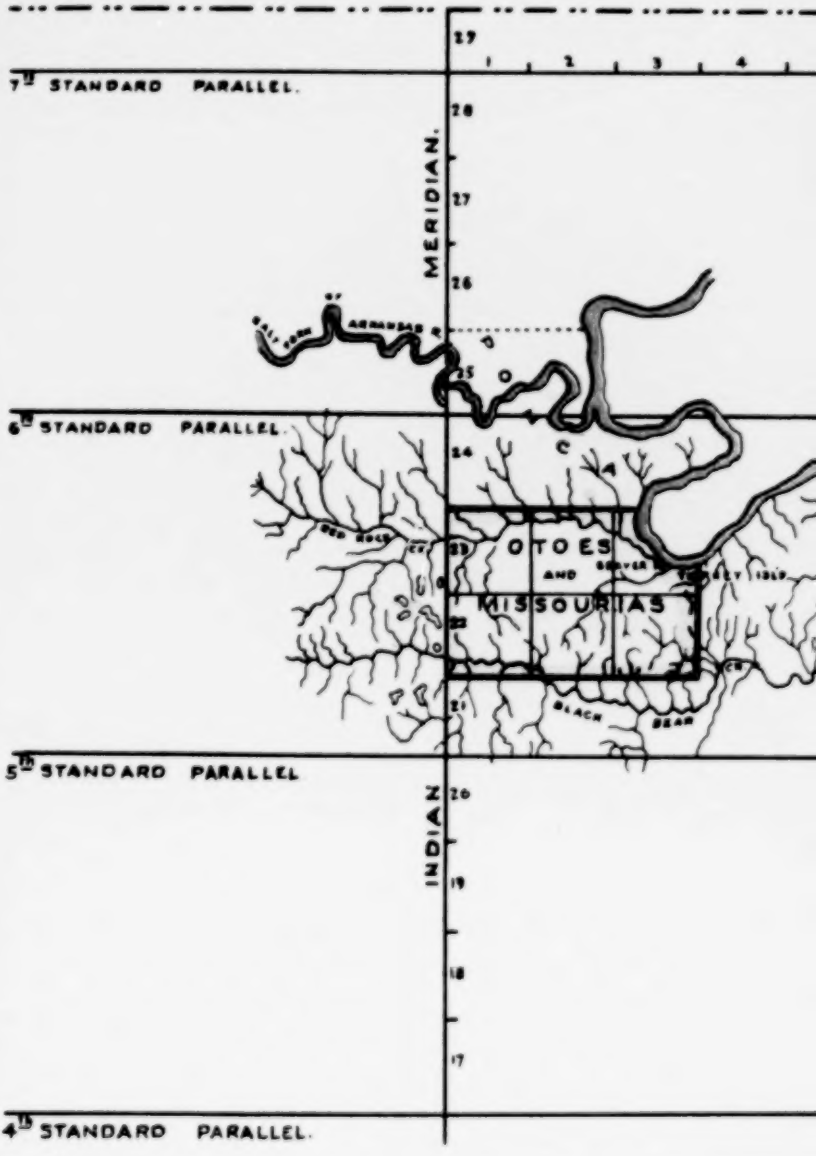
DISTRICT OF COLUMBIA,
County of Washington, ss:

On this fourteenth day of June A. D., Eighteen-hundred and Eighty-three before me, a Notary Public, in and for the District aforesaid, personally came Dennis W. Bushyhead, Richard M. Wolfe and Robert B. Ross, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed, for the purposes and under the authority therein mentioned.

Geo. M. Lockwood, Notary Public. (Seal.)

[Certified.]

(Here follows 1 Photolithograph, side folio 133-134)


7 12 STANDARD PARALLEL.
6 48 STANDARD PARALLEL.
5 36 STANDARD PARALLEL
4 15 STANDARD PARALLEL.
INDIAN MERIDIAN.
OTOES
AND
MISSOURIAS
BLACK BEAR
CR
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A

[fol. 135] PLAINTIFF'S EXHIBIT 20

[Plaintiff's exhibit 20 is a Treaty between United States of America and Cheyenne and Arapahoe Indians, October 28, 1867, and the Court by order of May 26, 1945, authorized reference to this exhibit without it being printed.]

[Plaintiff's exhibit 21 is identical with exhibit B to motion for summary judgment (page 35 this record) with the exception that a notation with reference to Champlin No. 1 river bed well is not shown on plaintiff's exhibit 21.]

PLAINTIFF'S EXHIBIT 22

[Plaintiff's exhibit 22, opinion, case No. 75, Equity, United States District Court, Western District of Oklahoma, United States of America v. Brewer-Elliott Oil and Gas Company et al., is reported at 249 Fed. 609, and the court by order of May 26, 1945, authorized reference to this exhibit without it being printed.]

PLAINTIFF'S EXHIBIT 23

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 75 Equity

UNITED STATES OF AMERICA, Plaintiff,

vs.

BREWER-ELLIOTT OIL & GAS COMPANY, a Corporation, et al., Defendants

Order, That Findings of Fact in the Opinion Be Adopted as the Findings of Fact by the Court

It is this day ordered that the findings as contained in the written opinion filed on the rendition of the final decree

in the above entitled cause be and the same are adopted as the findings of fact by the court therein.

February 21, 1918.

John H. Cotteral, District Judge.

Endorsed: Filed in the District Court on February 21, 1918.

[fol. 136] PLAINTIFF'S EXHIBIT 24

IN THE DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 75 in Equity

UNITED STATES OF AMERICA, Plaintiff,

vs.

BREWER-ELLIOTT OIL & GAS COMPANY, et al., Defendants

Decree

On this twenty first day of February, 1918, the said cause comes on for final determination, after having been fully tried and submitted, and upon consideration thereof, and the arguments of counsel, it is by the court,

Ordered, adjudged and decreed, that the Osage tribe of Indians in Oklahoma acquired, as a part of its reservation, the title to the bed of the Arkansas River, lying adjacent to the lands of said reservation, in the State of Oklahoma, as far as and extending to the middle of the main channel of said river, together with the underlying oil, gas and other minerals, by virtue of the Act of Congress approved June 5, 1872, and as confirmed by the deed of the Cherokee Nation of Indians, dated June 14, 1883, that the title to said portion of said river bed and said minerals are subject to lease only for the benefit of said tribe, as provided by the laws of the United States, and as may be hereafter provided by said law, and that the said title of the said tribe and the United States as its trustee, should be and is hereby quieted. And it is further by the court,

Ordered, adjudged and decreed, that the defendant lessees and their sub-lessees, assignees and successors in interest and the interveners herein, and each of them, have no right,

title or interest to or in said portion of said river bed or minerals and that the leases therefor of the defendant companies and their sub-lessees, assignees and successors from the state of Oklahoma and its officers and agents involved in this cause be and they are hereby cancelled and held for naught. And it is further by the court,

Ordered, adjudged and decreed, that the net funds which have been and may hereafter be realized by the receiver herein from the oil and gas in said premises belong to, and be paid by him to, the United States in trust for said tribe, and that the said lessees and their sub-lessees, assignees and successors and said intervenors be denied any part [fol. 137] thereof, and in addition be and they are hereby enjoined from prospecting for or taking oil, gas or other minerals from said portion of said river bed, except in accordance with the orders for operation and payment under and in connection with the receivership in this cause, and for the preservation of said funds. And it is further by the court,

Ordered, adjudged and decreed, that this cause be retained for the purpose of settling and paying the costs and charges of the said receivership and apportioning to the plaintiff for the tribe its interest in the funds of the said receiver, and for the ascertainment of the rightful claimants and owners of the residue thereof, and the apportionment and payment to them of the same, and further for the purpose of taxing all costs herein, and the making of all proper future orders, and that in the meantime, and during the pendency of any and all appeals in this cause, the receiver be continued in his duties as heretofore directed, subject to future orders.

To the said decree, and every part thereof, and to each and every of the above findings and orders of the parties defendant and interveners and each of them separately and jointly, at the time excepted and except; and said exceptions are allowed:

Approved:

John H. Cotteral, District Judge.

Endorsed: No. 75. United States of America, vs. Brewer-Elliott Oil & Gas Co., et al. Final Decree. Filed Feby. 21, 1918. Arnold C. Dolde, Clerk. By M. V. Haws, Deputy.

[Certified.]

DEFENDANTS' EXHIBITS 1, 1 A, AND 1 B

[Defendants' exhibit 1 is a Treaty between United States of America and Western Cherokee Nation, May 6, 1828. Defendants' exhibit 1 A is a Treaty between United States of America and Western Cherokee Nation, 1833. Defendants' exhibit 1 B is a Treaty between United States of [fol. 138] America and Cherokee Nation, 1835. The court by order of May 26, 1945, authorized reference to these exhibits without them being printed.]

DEFENDANTS' EXHIBIT 1 C

(Illegible) day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States the sixty third.

By the President: Martin Van Buren. By M. Van Buren, Jr.

H. W. Garland, Recorder of the General Land Office.

The United States of America, To all to whom these Presents shall come, Greetings.

Whereas by certain treaties made by the United States of America with the Cherokee nation of Indians of the sixth of May, one thousand eight hundred and twenty eight, the fourteenth of February, one thousand and eight hundred and thirty three, and the twenty ninth of December, one thousand eight hundred and thirty five, it was stipulated and agreed on the part of the United States, that in consideration of the premises mentioned in the said treaties, respectively, the United States should guarantee, secure and convey, by patent, to the said Cherokee nation, certain tracts of land; the description of which tracts and the terms and conditions on which they were conveyed, are set forth in the second and third articles, of the treaty of the twenty ninth of December, one thousand eight hundred and thirty five in the words following, that is to say: "Article 2." Whereas, by the "treaty of May sixth, one thousand eight hundred and "twenty eight, and the supplementary treaty thereto "of February fourteenth, one thousand eight hun- "dred and thirty three, with the Cherokees West of "the Mififippi, the United States *guarantied* "and accrued, to be conveyed by patent to the "Cherokee nation of

Indians, the following tract of country: "Beginning at a point on the old western territorial line of "Arkansas territory, being twenty five miles north from the "point where the territorial line crofes Arkansas river; thence "running from said north point south on the said territorial "line, [fol. 139] where the said territorial line crofes Verdigris river; thence "down said Verdigris river to the Arkansas; thence down "said Arkansas to a point where a stone is placed opposite "the east or lower bank of Grand river, at its junction with "the Arkansas; thence, running south forty four degrees "west one mile; thence in a straight line, to a point four "miles northerly from the mouth of the north fork of the "Canadian; thence, along the said four mile line to the "Canadian; thence down the Canadian to the Arkansas, "thence down the Arkansas to that point on the Arkansas "where the Eastern Choctaw boundary strikes said river and "running thence with the western line of Arkansas territory "as now defined, to the south west corner of Mifouri; "thence along the western Mifouri line to the land "afigned the Seneca; thence, on the South line of the "Senecas to Grand river; thence, up said Grand river, "as far as the South line of the Osage reservation extends "if necefary; thence up and between said South Osage "line extended West of necefary, and a line drawn "due west from the point of beginning to a certain distance "west, at which a line running North and South from "said Osage line to said due West line, will make seven "millions of acres within the whole described boundaries. "In addition to the seven millions of acres of land "this provided for and bounded, the United States "further guaranty to the Cherokee Nation a perpetual "outlet West, and a free and unmolested use of all "Country West of the Western (illegible) "millions of acres, as far West as the sovereignty of the United "States and their right of soil extended, Provided however, "That if the Saline or Salt plain on the Western prairie "shall fall within said limits prescribed for said outlet, "the right is reserved to the United States to permit other "tribes of red men to get Salt on said plain, in common "with the Cherokees. And letters patent shall be "ifued by the United States as soon as practicable "for the land hereby *guarantied*. And whereas, it is apprehended by the Cherokees that in the above cefion "there is not contained a sufficient quantity of lands "for the accommodation of the whole nation, on their "removal West

of the Mififippi, the United States, in "consideration of the sum of five hundred thousand "dollars, therefore hereby covenant and agree to convey "to the said Indians and their [fol. 140] descendants, by patent, "in fee simple, the following additional tract of land "situated between the west line of the State of Mifouri "and the Osage reservation, beginning at the Southeast "corner of the same, and runs North along the East line of "the Osage land fifty miles, to the Northeast corner thereof; and thence East to the West line of the State of Mifouri; thence with said line South fifty miles; thence West "to the place of beginning; estimated to contain eight "hundred thousand acres of land but is exprefly understood "that if any of the land assigned the Quapaws shall "fall within the aforesaid bounds, the same shall be reserved "and excepted out of the lands above granted, and a "prorata reduction shall be made in the price to be "allowed to the United States for the same by the Cherokees. "Article 3:" The United States also agree, that the "land above ceded by the Treaty of February fourteenth, "one thousand eight hundred and thirty three including "The outlet, and those ceded by the treaty, shall all be "included in one patent executed to the Cherokee Nation of "Indians by the President of the United States according "to the provisions of the Act of May twenty eight, one thousand "eight hundred and thirty. It is however, agreed that the "military reservation at Fort Gibson shall be held by "the United States. But should the United States "abandon said port, and have no further use for the same, "it shall revert to the Cherokee Nation. The United States "shall always have the right to make and establish such "post and military roads and forts in any part of the "Cherokee Country, as they may deem proper for the interest "and protection of the same, and the free use of as much land, "timber, fuel and material of all kinds, for the construction "and support of the same, as may be necefary; provided, that "if private rights of individuals are interfered with just "compensation therefor shall be made."

And whereas, the United States have caused the said tract of seven millions of acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows:

Beginning at a mound of rocks four feet square at base and four and a half feet high, from which another mound

of Rocks bears South one chain, and another mound of rocks [fol. 141] bears West on- chain, on what has been denominated the old western territorial line of Arkansas Territory, twenty five miles north of Arkansas river; thence South twenty one miles and twenty eight chains, to a post on the northeast bank of the Verdigris river, from which a hackberry fifteen inches diameter, bears South sixty one degrees thirty one minutes East, forty three links, marked C.H.I., and a Cottonwood forty two inches diameter, bears South twenty one degrees fifteen minutes, east fifty links marked C.R.K.L.; thence down the Verdigris river, or the Northeast bank, with its meanders, to the junction of Verdigris and Arkansas rivers, thence from the lower bank of Verdigris river, on the North bank of Arkansas river, South forty four degrees, thirteen minutes, East fifty seven chains, to a post on the South bank of Arkansas, opposite the eastern bank of Neosho river, at its junction with Arkansas, from which a red oak, thirty six inches diameter, bears South seventy five degrees, forty five minutes West, twenty four links and a hickory, twenty four inches diameter, bears South eighty nine degrees East four links; thence South fifty-three degrees West, one mile to a post, from which a rock bears North fifty three degrees East, fifty links and a rock bears South eighteen degrees, eighteen minutes west fifty links; thence South eighteen degrees, eighteen minutes West thirty three miles twenty eight chains and eighty links, to a rock, from which, another rock bears North, eighteen degrees, eighteen minutes east fifty links and another rock bears South fifty links; thence South four miles, to a post on the lower bank of the north fork of Canadian river, at its junction with Cananian river from which a Cottonwood, twenty four inches diameter, bears North eighteen degrees East, forty links, and a Cottonwood fifteen inches diameter, bears South nine degrees East fourteen links; thence down the Canadian river, on its North Bank, to its junction with Arkansas river; thence down the main channel of Arkansas river to the Western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on South Bank of Arkansas river four chains and fifty four links, East of Fort Smith; thence North seven degrees, twenty five minutes west, with the western boundary of the [fol. 142] State of Arkansas, seventy six miles, sixty four chains and fifty links to the Southwest corner of the State

of Mifouri; thence North, on the Western boundary of the State of Mifouri, eight miles, forty nine chains and fifty links, to the North bank of Cowskin or Seneca river at a mound six feet square at base, and five feet high, in which a post marked on the South side Co. N. Ch. L. A.; thence west on the southern boundary of the lands of the Seneca, eleven miles and forty eight chains to a post on the east bank of Neosho river, from which a maple, eighteen inches in diameter, bears South thirty one degrees East, seventy links; thence up Neosho river with it meanders, on the east bank to the southern boundary of Osage lands, thirty six chains and fifty links west of the Southeast corner of the lands of the Osages, witnefed by a mound of rocks on the west bank of Neosho river; thence west on the southern boundary of the Osage lands; to the line dividing the territory of the United States from that of Mexico, two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square at base, and five and a half feet high, in which is deposited a cylinder of charcoal, twelve inches long and four inches diameter; thence South along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square at the base and five and a half feet high, in which is deposited cylinder of charcoal, eighteen inches long and three inches diameter; thence east along the northern boundary of Creek lands, two hundred and seventy three miles, fifty five chains and sixty six links to the beginning, containing within the survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundreths of an acre. And whereaf, the United States have also caused the said tract of eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof to be as follows: Beginning at a South east corner of Osage lands, described by a rock from which a red oak, twenty inches in diameter, bears South twenty seven degrees East seventy six links, and a burr Oak, thirty inches in diameter, bears South fifty-nine degrees West one chain; and another burr oak thirty inches diam-ter, bears North eight degrees west, one chain and thirty seven links; and another burr oak forty inches in [fol. 143] diameter, bears North thirty degrees West, one chain, and eighty one links, and running east twenty five miles to a rock on the western line of the State of Mifouri, from which a post oak, ten inches diameter, bears North

forty eight degrees, thirty minutes east, four chains; and a post oak twelve inches diameter, bears South sixty two degrees East five chains; thence North with the western boundary of the State of Mifouri, fifty miles, to a mound of earth five feet square at base and four and a half feet high; thence West twenty five miles to the North east corner of the lands of the Osages, described by a mound of earth six feet square at the base and five feet high; thence South along the Eastern boundary of Osage lands, fifty miles, to the beginning: containing eight hundred thousand acres.

Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted and by these presents do give and grant, unto the said Cherokee Nation, the two tracts of land as surveyed and herein before described, containing, in the whole Fourteen millions, three hundred and seventy four thousand one hundred and thirty five acres, and fourteen hundredths of an acre: To have and to hold the same, together with all the rights, privileges and appurtenances thereunto belonging to the said Cherokee Nation forever, subject however to the right of the United States to permit other tribes of red men to get Salt on the Salt plains on the western prairie, referred to in the Second Article of the treaty of the twenty ninth of December, one thousand eight hundred and thirty five, which Salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said Article; and subject also to all the other rights reserved to the United States, in and by the article herein before recited, to the extent and in the manner, in which the said rights are reserved; and subject also to the condition provided by the Act of Congref of the twenty eighth of May one thousand eight hundred and thirty; referred to in the above recited third Article, and which condition is that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct or abandons the same.—

In Testimony Whereof, I, Martin Van Buren, President [fol. 144] of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.—

Given under my hand, at the City of Washington, the thirty first day of December, in the year of our Lord, one

thousand eight hundred and thirty eight and the Independence of the United States, the sixty third.

By the President: M. Van Buren. H. W. Garland, Recorder of the General Land Office. (Seal.)

[Certified.]

Defendants' Exhibits 2, 3, 4 and 5

[Defendants' exhibit 2 is a Treaty between United States of America and Cherokee Nation, July 19, 1866. Defendants' exhibit 3 is Act of April 10, 1876; 19 Stat. 28; Sec. 4, Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 160. Defendants' exhibit 4 is Act of March 3, 1881; 21 Stat. 380; Sec. 5, Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 190. Defendants' exhibit 5 is 22 Statutes at Large, page 624, 47 Congress Session 11 Ch. 143, 1883. The Court by order of May 26, 1945, authorized reference to these exhibits without them being printed.]

Defendants' Exhibit 5 A

Executive Orders Relating to Indian Reserves. 271
Modoc Reserve

Articles of agreement made and concluded at Quapaw Agency, I. T., June 23, 1874, between the United States, by H. W. Jones, United States Indian Agent, and the Eastern Shawnee Indians.

Whereas it is desirable that the Modoc Indians (now temporarily located on the Eastern Shawnee Reservation) should have a permanent home in order that they may be enabled to settle down and become self-supporting. Therefore, it is agreed—

1st. The Eastern Shawnees cede to the United States a tract of land situated in the northeast corner of their pres- [fol. 145] ent reservation in the Indian country. The land so ceded to be *m*ounded as follows, to wit: Beginning at the northeast corner of their reservation, running south along the Missouri State line two and one-half miles; thence west two and one-half miles; thence north to the north line of said reserve; thence east along said north line

to the place of beginning, containing 4,000 acres, more or less, for which the United States is to pay six thousand dollars, one-half upon the ratification of this agreement by the Secretary of the Interior, the balance in twelve months thereafter; said instalments to be paid to the Eastern Shawnee Indians per capita, for the purpose of enabling them to enlarge their farms and otherwise improve their condition in civilization.

2d. The land proposed to be purchased in the 1st article of this agreement shall be set apart as a permanent home for the Modoc Indians.

3d. And it is further agreed that in case the United States fails to carry out the provisions of the agreement this contract shall be null and void.

In testimony whereof we have hereunto set our hands and seals the day and year first above written.

H. W. Jones, [Seal]
U. S. Indian Agent.
James Choctaw, his + mark.
Thomas Captain, his + mark.
Chiefs.
John Logan, his + mark.
John Williams, his + mark.
Councillors.
Good Hunt, his + mark.
Billy Dick, his + mark.
John Mohawk, his + mark.
Corn Stalk, his + mark.
George Beaver, his + mark.
Samson Kyzer, his + mark.
John Jackson, his + mark.
Young Men.

Attest:

Lazarus Flint, Interpreter.
Endsley Jones.

(Recorded in Records of Treaties, vol. 3, p. 19.)

[fol. 146] This agreement was confirmed in Indian appropriation act of March 3, 1875. (18 Stats, p. 447.)

[At this point in defendants' exhibit 5 A is set out a letter, June 25, 1881, The Secretary of the Interior to the Commissioner of Indian Affairs, which appears at page 121 of this record as plaintiff's exhibit 5.]

272 Executive Orders Relating to Indian Reserves
Ponca Reserve

By the Indian appropriation act of August 15, 1876 (19 Stats., p. 192), an appropriation was made for the removal of the Poncas to the Indian Territory when they should consent to go. By the Indian appropriation act of March 3, 1877 (19 Stats., p. 287), an additional appropriation was made for the same purpose, but there was nothing contained therein respecting their consent. Under these acts the Poncas were removed to the Quapaw Reserve. Inspector Watkins and Agent Boone, under department instructions took a delegation of these Indians, in December, 1877, to the country west of the Arkansas River to select a permanent home, either in the triangle east of the Pawnees, or in the Shakaskia country.

On the 2d of January, 1878, Inspector Watkins reported that "The Indians all desire to go to the North, to the Shakaskia country, and say that is the country they want." On the 30th of January, 1878, White Eagle, Standing Buffalo, the chief, Frank LaFlesche, chief, telegraphed, "We have selected reservations between Arkansas and Shakaskia rivers. Please certify to selection."

By the Indian appropriation act of May 27, 1878 (20 Stats., p. 76), an appropriation was made for the immediate removal of the Poncas from the Quapaw Reservation, Indian Territory, to a new one west of the Kaw or Kansas, and between the Arkansas and Shakaskia rivers, and for their settlement thereon. In accordance with the provisions of this act, the following tracts of land were assigned the Poncas, viz: Townships 24 and 25 north, range 1 east, and all of townships 24 and 25 north, ranges 2, 3, and 4 east, lying west of the Arkansas River, and containing 101,894.31 acres. By the deficiency appropriation act of March 3, 1881 (21 Stats., p. 422), and appropriation was [fol. 147] made to enable the Secretary of the Interior to secure to the Poncas lands in severalty, on either their old or their new reservation, in accordance with their wishes, $50,000 of which was especially appropriated for the purchase of one hundred and one thousand eight hundred and ninety-four acres of land in the Indian Territory, where most of the Indians are now located; and in September, 1881, the sum of $48,389.46 was placed to the credit of the Cherokee Nation on the books of the Treasury for

the purchase of this land, at 47.49 cents per acre, the price fixed by the President on the 23d of June, 1879.

Michigan

Isabella Reserve

Department of the Interior, Office of Indian Affairs

December 11, 1854.

SIR:

I inclose a copy of a letter from Messrs. George Smith and P. O. Johnson, missionaries of the Methodist Episcopal Church in Michigan, addressed to Rev. Dr. Durbin, and by him forwarded to this office, in relation to certain desired reservations of public lands.

In consideration of certain contemplated arrangements with the Indians in Michigan during the ensuing spring, I have to ask that you reserve from public sale the lands designated in the letter of Messrs. Smith and Johnson.

I have also received a communication from the Rev. J. P. Durbin, corresponding secretary of the Missionary Society of the Methodist Episcopal Church, asking for an additional reservation of lands near Iroquois Point, back from the lake.

For the reasons above, I concur in the request, and ask that several additional sections to those already reserved be made of the lands in the vicinity of Iroquois Point.

Very respectfully, your obedient servant, Geo. W. Manypenny, Commissioner.

John Wilson, Esq., Commissioner of General Land Office.
[Certified.]

[fol. 148] [Defendants' exhibit 6, deed, June 14, 1833, between Cherokee Nation and the United States of America in trust for the Otoe and Missouria Indians, is identical with plaintiff's exhibit 7 which appears at page 129.]

Defendants' Exhibits 7 and 8

II-119 to II-122.

[Defendants' exhibits 7 and 8 are certified copies of plats of survey of T. 23 N., R. 3 E. I. M., Oklahoma, 1872. It is not deemed practicable to insert copies of the survey in the printed record. Copies of the survey are available for the use of the Court.]

Defendants' Exhibit 9

State of Oklahoma,
County of Garfield, ss:

Roy G. Collier, being duly sworn, does hereby certify that he is an engineer in the employ of Champlin Refining Company; that he has carefully computed the acreage as shown on the attached map, lying west of the Arkansas river, using the acreage figures as shown on the map, and that the total number of acres of that portion of Township 23, North, Range 3 East, lying west of the Arkansas River as shown on the said map contains 14099.24 acres.

The number of acres as shown on the map for each section, lot, or fraction thereof are shown on the attached worksheets which I certify to be a true and correct list of the number of acres as shown on the map.

Roy G. Collier, Civil Engineer.

Subscribed and sworn to before me this 11th day of December, 1942. Anna Marie Markes, Notary Public. My Commission Expires June 12, 1946. (Seal.)

[fol. 149] Twp 23 N—R 3E—Pawnee County, Okla

Areas South and West of the "Right" (South) Bank of the Arkansas River—(Not Including Bayou)

Description		Acres
Section	5	155 97
	6	629 02
	7	630 58
	8	453 55
	9	1 22
	15	14 55
	16	258 25
	17	613 80
	18	630 98
	19	630 78
	20	640 00
	21	622 62
	22	570 92
	23	271 23
	24	314 01
	25	640 00
	26	640 00
	27	640 00
	28	640 00
	29	640 00
	30	631 10
	31	630 66
	32	640 00
	33	640 00
	34	640 00
	35	640 00
	36	640 00
		14 099.24

[fol. 150] TWP 23N—R3E—Pawnee County, Okla.

Areas South and West of the "Right" (South) Bank of the Arkansas River—Not Including the "Bayou"

Description			Acres	
SW¼ Sec. 5-23N-3E	Lot	7	3 92	
	"	8	48 95	
	"	9	42 65	
NW¼ Sec. 5-23N-3E	"	10	36 25	
	"	11	24 20	155 97
NE¼ Sec 6-23N-3E	Lot	1	40 87	
	"	2	40 62	
		S½	80 00	
NW¼ Sec 6-23N-3E	Lot	3	40 37	
	"	4	36 24	
	"	5	36 56	
		SE¼	40 00	
SW¼ Sec 6-23N-3E	Lot	6	36 97	
	"	7	37 39	
		E½	80 00	
SE¼-Sec 6-23N-3E			160 00	629 02
NE¼-Sec. 7-23N-3E			160 00	
NW¼ Sec 7-23N-3E		E½	80 00	
	Lot	1	37 61	
	"	2	37 63	
SW¼Sec. 7-23N-3E	Lot	3	37 66	
	"	4	37 68	
		E½	80 00	
SE¼-Sec 7-23N-3E			160 00	630 58
N½ Sec. 8-23N-3E	Lot	5	27 48	
	"	6	31 20	
	"	11	37 15	
	"	12	40 15	
	"	13	37 70	
S½ Sec. 8-23N-3E	"	4	13 24	
	"	7	39 98	
	"	8	40 00	
	"	9	33 97	
	"	10	33 33	
	"	14	41 25	
	"	15	41 80	

[fol. 151]

Description						Acres	
Sec. 8	38.60	9.87	13.24	27.48	31.20		
502.02-(Lots	1,	2,	4,	5,	6,		
	39.98	40.00	33.97	33.33	37.15	40.15	
	7,	8,	9,	10,	11,	12,	
	37.70	41.25	41.80				
	13,	14,	15)=		Lot 3	36 36	453 55
SW¼-Sec.	9-23N-3E				Lot 4	1 22	1 22
SW¼ "	15-23N-3E				Lot 5	11 20	
					" 6	3 20	
					" 7	15	14 55
NW¼-Sec.	16-23N-3E				Lot 1	14 62	
					" 2	34 42	
SW¼-Sec.	16-23N-3E				" 3	24 42	
					" 8	39 42	
					" 9	11 70	
					" 10	22 04	
					NW¼	40 00	
SE¼-Sec.	16-23N-3E				Lot 4	21 40	
					" 5	9 65	
					" 6	18 70	
					" 7	21 88	258 25
NE¼-Sec.	17-23N-3E				N½	80 00	
					Lot 8	39 68	
					" 9	29 24	
NW¼-Sec.	17-23N-3E				" 1	38 42	
					" 2	21 50	
					" 10	13 70	
					" 11	36 80	
					SW¼	40 00	
SW¼-Sec.	17-23N-3E					160 00	
SE¼-Sec.	17-23N-3E				SW¼	40 00	
					Lot 3	46 67	
					" 4	10 04	
					" 5	24 28	
					" 6	9 40	
					" 7	24 07	613.80
NE¼-Sec.	18-23N-3E					160 00	
SE¼-Sec.	18-23N-3E					160 00	
NW¼-Sec.	18-23N-3E				E½	80 00	
					Lot 1	37 71	
					" 2	37 73	

[fol. 152]

Description		Acres	
SW¼-Sec. 18-23N-3E	E½	80 00	
	Lot 3	37 76	
	" 4	37 78	630 98
NE¼-Sec. 19-23N-3E		160 00	
SE¼-Sec. 19-23N-3E		160 00	
NW¼-Sec. 19-23N-3E	E½	80 00	
	Lot 1	37 77	
	" 2	37 72	
SW¼-Sec. 19-23N-3E	E½	80 09	
	Lot 3	37 67	
	" 4	37 62	630 78
All Sec. 20-23N-3E		640 00	640 00
NE¼-Sec. 21-23N-3E	Lot 1	35 88	
	" 2	6 22	
	" 3	32 24	
	W½	80 00	
NW¼-Sec. 21-23N-3E		160 00	
SW¼-Sec. 21-23N-3E		160 00	
SE¼-Sec. 21-23N-3E	Lot 4	28 28	
	W½	80 00	
	SE¼	40 00	622 62
Section 22-23N-3E	Lot 1	2 75	
	" 2	35 20	
	" 3	38 20	
	" 4	27 80	
	" 5	15 85	
	" 7	45 74	
	" 8	48 36	
	" 9	47 68	
	" 10	41 70	
	" 11	31 06	
	" 12	24 68	
	" 13	25 00	
	" 14	26 90	
	S½SW¼	80 00	
	S½SE¼	80 00	570 92
NW¼-Sec. 23-23N-3E	Lot 12	25 35	
SE¼ of NW¼ and NE¼ of SW¼ and NW¼ of SE¼-Sec. 23	" 10	24 92	
SW¼-Sec. 23-23N-3E	Lot 8	13 24	
	" 9	14 60	
	" 11	18 80	
	S½	80 00	

[fol. 153]

Description		Acres	
SE¼-Sec. 23-23N-3E	Lot 6	5 20	
	" 7	9 12	
	S½	80 00	
SW¼-Sec. 24-23N-3E	Lot 7	23 84	
	" 8	12 72	
	S½	80 00	271 23
SE¼-NE¼ Sec. 24-23N-3E	Lot 5	32 00	
SW¼ of NE¼ and NW¼ of SE¼-Sec. 24	" 6	45 45	
SE¼-Sec. 24-23N-3E	NE¼	40 00	
	S½	80 00	314 01
All Sec. 25-23N-3E		640 00	640 00
All Sec. 26-23N-3E		640 00	640 00
All Sec. 27-23N-3E		640 00	640 00
All Sec. 28-23N-3E		640 00	640 00
All Sec. 29-23N-3E		640 00	640 00
NE¼-30-23N-3E		160 00	
NW¼-30-23N-3E	E½	80 00	
	Lot 1	37 64	
	" 2	37 73	
SW¼-30-23N-3E	E½	80 00	
	Lot 3	37 82	
	" 4	37 91	
SE¼-30-23N-3E		160 00	631 10
NE¼-31-23N-3E		160 00	
NW¼-31-23N-3E	E½	80 00	
	Lot 1	37 88	
	" 2	37 74	
SW¼-31-23N-3E	E½	80 00	
	Lot 3	37 59	
	" 4	37 45	
SE¼-31-23N-3E		160 00	630 66
All Sec. 32-23N-3E		640 00	640 00
All Sec. 33-23N-3E		640 00	640 00
All Sec. 34-23N-3E		640 00	640 00
All Sec. 35-23N-3E		640 00	640 00
All Sec. 36-23N-3E		640 00	640 00
			14 099 24

[fol. 154] [The plat, which appears as part of defendants' exhibit 9, survey of T. 23 N., R. 3 E. I. M., Oklahoma, 1872, is not deemed practicable of insertion in copies of the

printed record. Copies of the plat are available for the use of the Court.]

DEFENDANTS' EXHIBIT 9 A

Affidavit

STATE OF OKLAHOMA,
County of Pawnee, ss:

O. F. Sewell, County surveyor of Pawnee County, Oklahoma, being duly sworn does hereby certify that he has carefully computed the acreage as shown on the attached United States survey of Township 23 North, Range 3 East of the Indian Meridian, which survey is dated September 16, 1872;

That in computing the said acreage, affiant has used the figures as shown on the attached survey, and that the acreage figures on the said survey show that the total number of acres within that portion of Township 23 North, Range 3 East, lying west of the Arkansas River, is 14,099.24 acres.

The number of acres as shown on the attached survey for each section, lot, or fraction thereof of said Township 23, North, Range 3 East, lying west of the Arkansas River, is shown on the attached work sheets, which I certify to be a true and correct computation of the acreage above described.

O. F. Sewell, County Engineer of Pawnee County, Oklahoma.

Subscribed and sworn to before me this 23rd day of November, 1943. Ruth Jones, Notary Public. My Commission Expires: May 16, 1947. (Seal.)

[fol. 155] Twp 23 North, Range 3 EIM, Pawnee County Oklahoma area south and west of the right (south) bank of the Arkansas River (Not including Bayou).

Description	Acres
Section 5	
Lot 11	29.20
" 10	36.25
" 9	42.65
" 8	43.95
" 7	3.92
Total	155.97
Section 6	
Lot 1	40.87
" 2	40.62
" 3	40.37
" 4	36.24
" 5	36.56
" 6	36.97
" 7	37.39
SE-NW¼	40.00
S½-NE¼	80.00
E½-SW¼	80.00
All SW¼	160.00
Total	629.02
Section 7	
Lot 1	37.61
" 2	37.63
" 3	37.66
" 4	37.68
E½-NW¼	80.00
E½-SW¼	80.00
All NE¼	160.00
" SW¼	160.00
Total	630.58
Section 16	
Lot 1	14.62
" 2	34.42
" 3	24.42
" 4	21.40
" 5	9.65
" 6	18.70
" 7	21.88
" 8	39.42
" 9	11.70
" 10	22.04
NW-SW¼	40.00
Total	258.25
Section 17	
Lot 1	38.42
" 2	21.50
" 3	46.67
" 4	10.04
" 5	24.28
" 6	9.40
" 7	24.07
" 8	39.68
" 9	29.24
" 10	13.70
" 11	36.80
SW-NW¼	40.00
N½-NE¼	80.00
SW-SE¼	40.00
All SW¼	160.00
Total	613.80

[fol. 156]

Description	Acres
Section 8	
Lot 3	36.30
" 4	13.24
" 5	27.48
" 6	31.20
" 7	39.98
" 8	40.00
" 9	33.97
" 10	33.33
" 11	37.15
" 12	40.15
" 13	37.70
" 14	41.25
" 15	41.80
Total	453.55
Section 9	
Lot 4	1.22
Total	1.22
Section 15	
Lot 5	11.20
" 6	3.20
" 7	0.15
Total	14.55

Description	Acres
Section 18	
Lot 1	37.71
" 2	37.73
" 3	37.76
" 4	37.78
All NE¼	160.00
E½-NW¼	80.00
E½-SW¼	80.00
All SE¼	160.00
Total	630.98
Section 19	
Lot 1	37.77
" 2	37.72
" 3	37.67
" 4	37.62
E½-NW¼	80.00
E½-SW¼	80.00
All NE¼	160.00
All SE¼	160.00
Total	630.78
All Section 20	640.00

[fol. 157] Twp 23 North, Range 3 EIM, Pawnee County Oklahoma area south and west of the right (south) bank of the Arkansas River (not including Bayou).

Description	Acres
Section 21	
Lot 1	35.88
" 2	6.22
" 3	32.24
" 4	28.28
SE-SE¼	40.00
W½-SE¼	80.00
W½-NE¼	80.00
All NW¼	160.00
All SW¼	160.00
Total	622.62
Section 22	
Lot 1	2.75
" 2	35.20
" 3	38.20
" 4	27.80
" 5	15.85
" 7	45.74
" 8	48.36
" 9	47.68
" 10	41.70
" 11	31.06
" 12	24.68
" 13	25.00
" 14	26.90
S½-SE¼	80.00
S½-SW¼	80.00
Total	570.92

Description	Acres
Section 30	
Lot 1	37.64
" 2	37.73
" 3	37.82
" 4	37.91
E½-NW¼	80.00
E½-SW¼	80.00
All NE¼	160.00
All SE¼	160.00
Total	631.1
Section 31	
Lot 1	37.88
" 2	37.74
" 3	37.59
" 4	37.45
E½NW¼	80.00
E½SW¼	80.00
All NE¼	160.00
All SE¼	160.00
	630.66
All Section 32	640.00
" " 33	640.00
" " 34	640.00
" " 35	640.00
" " 36	640.00
Grand Total	14,099.24

[fol. 158]

Description	Acres	Description	Acres
Section 23			
Lot 6	5.20		
" 7	9.12		
" 8	13.24		
" 9	14.60		
" 10	24.92		
" 11	18.80		
" 12	25.35		
S½-SE¼	80.00		
S½-SW¼	80.00		
Total	271.23		
Section 24			
Lot 5	32.00		
" 6	45.45		
" 7	23.84		
" 8	12.72		
NE-SE½	40.00		
S½-SE¼	80.00		
S½-SW¼	80.00		
Total	314.01		
All Section 25	640.00		
" " 26	640.00		
" " 27	640.00		
" " 28	640.00		
" " 29	640.00		

[The plat, which appears as part of defendants' exhibit 9-A, is identical with the plat which appears as part of defendants' exhibit 9, reference to which is made at page 154, this record.]

[fol. 159] DEFENDANTS' EXHIBITS 10, 11, 12, 13 and 14

[Defendants' exhibit 10 is an agreement between United States of America and the Pawnee Tribe of Indians (Kappler Indian Affairs, Laws and Treaties, Vol. 1, pages 496 to 498.) Defendants' exhibit 11 is Act of March 3, 1893, 27 Stat. 557, Secs. 12-13 (Pawnee Indian lands) Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 496. Defendants' exhibit 12 is articles of agreement, December 19, 1891, between United States of America and Cherokee Nation (Kappler Indian Affairs, Laws and Treaties, Vol. 1, pages 490 to 492). Defendants' exhibit 13 is Act of March 3, 1893, 20 Stat. 557, Sec. 10 (Cherokee outlet) Kappler Indian Affairs, Laws and Treaties, Vol. 1, page 489. Defendants' exhibit 14 is a proclamation by the President of the United States, August 19, 1893, 28 Stat. 1222 (Kappler Indian Affairs, Laws and Treaties, Vol. 1, pages 967, 969 and 971. The court by order of May 26, 1945, authorized reference to these exhibits without them being printed.]

DEFENDANTS' EXHIBIT 15

Certificate

Phil R. Hawkins does hereby certify that he is chairman of the Board of Administration of the State of Kansas and that as such official, he has custody of all of the records of the State with reference to the oil and gas leases covering the bed of the Arkansas River within the State of Kansas, and that he is familiar with the title of the bed of such River.

It Is Further Certified that the State of Kansas is the owner of the bed of the Arkansas River throughout its entire length within the limits of the State of Kansas, and that as such owner, the State of Kansas has executed oil and gas leases covering the bed of such River within the following counties of Kansas to-wit: Sumner; Reno; Barton; Rice; Cowley; Pawnee; Kearney; Sedgwick; and others

[fols. 160-162] It Is Further Certified that production of oil or gas is now being obtained from such leases in the following counties to-wit by the following lessees of the State of Kansas; Derby Oil Company, Barton Co.; Phillips Petroleum Company, Shell Oil Company, Inc., Sumner;

Standard Oil Co., Barton Co.; Consolidated Gas Company, Rice Co.; Vickers Petroleum Co., Rice Co.

It Is Further Certified that the oil and gas royalties and rentals from the above described leases covering the bed of the Arkansas River, are now, and have at all times been paid to the State of Kansas, and that the title to the bed of the said River and to the royalties and rentals therefrom has not been contested by any producing or pipeline company or any other party since the River was many years ago declared navigable by the Supreme Court of the State.

Phil R. Hawkins, Chairman, State Board of Administration.

Subscribed and sworn to before me this 12th day of October, 1943. Irma Walsh, Notary Public. My commission expires March 8, 1945. (Seal.)

Mr. Dean: (The Arkansas River was declared navigable April 6, 1912 in Hurst v. Dana, 86 Kan. 947; 122 P. A. C. 1041.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 163] In United States Circuit Court of Appeals, Tenth Circuit

Record Entry: Cause Argued and Submitted

First Day, May Term, Monday, May 20th, A. D. 1946.

Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Franklin E. Kennamer, District Judge

This cause came on to be heard and was argued by counsel, Fred W. Smith, Esquire, appearing for appellant, Nathan Scarritt, Esquire, and Harry Glasser, Esquire, appearing for appellees.

Thereupon this cause was submitted to the court.

In United States Circuit Court of Appeals, Tenth Circuit

Fred W. Smith, Atty., Dept. of Justice (J. Edward Williams, Acting Head, Lands Div., Dept. of Justice, Whit Y. Mauzy, U. S. Atty., and Roger P. Marquis, Atty., Dept. of Justice, were with him on the briefs) for appellant.

Nathan Scarritt and Harry O. Glasser (Mac Q. Williamson, Atty. Gen., Randall S. Cobb, Atty. Gen., J. Walker Field, Asst. Atty. Gen., Walter Marlin, Law and Exe-. Counsel for the Commissioners of the Land Office, State of Oklahoma, and E. S. Champlin were with them on the briefs) for appellees.

Coleman Hayes, R. B. F. Hummer, D. E. Hodges, Edward Howell, E. R. McNeill, N. E. McNeill, J. A. McCollum, and Roy C. Lytle filed a brief amici curiae.

Before Phillips and Murrah, Circuit Judges, and Kennamer, District Judge

Opinion—July 29, 1946

Phillips, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree adjudging that the State of Oklahoma is the owner of the south half of the Arkansas [fol. 164] River bed, in Oklahoma, adjoining four riparian tracts of land, which tracts the United States holds under trust patents for the benefit of certain of its Pawnee and Otoe Indian wards, and that the Champlin Refining Company has a valid and subsisting oil and gas lease upon such south half of the river bed.

The United States originally acquired title to the land in suit as part of the Louisiana Purchase. Under treaties of May 6, 1828,[1] February 14, 1833,[2] and December 29, 1835,[3] the United States, by deed dated December 31, 1838, conveyed to the Cherokee Nation a large tract of land on both sides of the bed of the Arkansas River, embracing the south half of the river bed here in suit. By the treaty of July 19, 1866[4] the Cherokee Nation agreed that the United States

[1] 7 Stat. 311.
[2] 7 Stat. 414.
[3] 7 Stat. 478.
[4] 14 Stat. 799.

might settle friendly Indians upon that part of the Cherokee lands known as the Cherokee Outlet, which embraced the portions of the river bed here in suit. Article 16 of that treaty provided that such lands would be conveyed to the Indians so settled. By treaty of October 28, 1867,[5] a reservation was set aside for the Cheyenne and Arapahoe Indians between the Cimarron and Arkansas Rivers. That reservation embraced the portions of the river bed here in suit. It was expressly extended to the middle of the Arkansas River. The Cheyenne and Arapahoe Indians declined such reservations and relinquished their claim. On June 5, 1872,[6] Congress authorized the Cherokee Nation to convey to the Osage Nation a tract of land described as follows: "Bounded • • • on the south and west by the north line of the Creek country and the main channel of the Arkansas River, • • •" The conveyance was made. It included the land on the opposite side of the river at approximately the location of the four riparian tracts and the title of the Osage Nation to the [fol. 165] north half of the river bed was upheld in subsequent litigation between the United States and the State of Oklahoma.[7]

The land on both sides of the Arkansas River at the location of the portions of the river bed here in suit was first surveyed into sections, townships, and ranges in September, 1872. The survey was approved on September 16, 1872.

Two of the riparian tracts are in Township 23 North, Range 4 East of the Indian Meridian. These tracts are held in trust for Pawnee Indians. The other two riparian tracts are located in Township 23 North, Range 3 East of the Indian Meridian. These tracts are held in trust for Otoe Indians.

Under the 1866 treaty with the Cherokees, and pursuant to the Act of March 3, 1881,[8] the Secretary of the Interior

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[5] 15 Stat. 593, 594.

[6] 17 Stat. 228.

[7] See United States v. Brewer-Elliott Oil & Gas Co., 249 F. 609;
Brewer-Elliott Oil & Gas Co. v. United States, 270 F. 100;
Brewer Elliott Oil & Gas Co. v. United States, 260 U. S. 77.

[8] 21 Stat. 380.

designated and assigned for the use and occupation of the Confederated Otoe and Missouria tribes of Indians "that portion of Tp. 23, N. R. 3 E. lying west of the Arkansas River. * * *"[9] Pursuant to the 1866 treaty with the Cherokees, and in conformity with the Act of March 3, 1883,[10] the Cherokee Nation, on June 14, 1883, conveyed to the United States in trust for the use and benefit of the Otoe and Missouria Indians: "Fractional township twenty-three (23) North, range three (3) East of the Indian Meridian: lying and being on the right bank of the Arkansas River, according to a plat of said lands hereto annexed, marked 'A,' and made a part of this conveyance * * *."[11] On November 24, 1906, a trust patent was issued to Ethel Lewis Barnes, an Indian of the Otoe and Missouria tribes, covering the following described land: "The South half and the North East quarter of the South East Quarter and the Lot numbered five of Section twenty-four, in Township twenty-three North of Range three East, of Indian Meridian in Oklahoma, con- [fol. 166] taining one hundred and fifty-two acres and twenty hundredths of an acre." The title to such land is now held by the United States in trust for Ethel Lewis Barnes. On June 10, 1907, a trust patent was issued to Anna Robedeaux, an Indian of the Otoe and Missouria tribes, covering the following described land: "* * * Lot numbered six of Section twenty four in Township twenty three North of Range three East of Indian Meridian in Oklahoma, * * *" Title to that land is now held by the United States in trust for the heirs of Anna Robedeaux. Both of these allotments are bounded by the Arkansas River.

By § 4 of the Act of April 10, 1876,[12] there was set aside as a reservation for the Pawnee Tribe of Indians, in accordance with the 1866 treaty with the Cherokees, the following described land: "All that tract of country between the Cinnarron [Cimarron] and Arkansas Rivers embraced within the limits of townships * * * twenty three, * * * of

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[9] Other townships, not here involved, were also included.

[10] 22 Stat. 603, 624.

[11] Other townships, not here involved, were also included.

[12] 19 Stat. 28, 29.

range four east, * * * of the Indian meridian," [13] In accordance with the 1866 treaty with the Cherokees, and pursuant to the provisions of the Act of March 3, 1883,[14] the Cherokee Nation, on June 14, 1883, conveyed to the United States in trust for the use and benefit of the Pawnee Tribe of Indians the following described land: "* * * fractional townships twenty-three (23) * * * north, range four (4) east; * * *" [15] The fractional townships referred to in this deed are described as "* * * the fractional townships being on the right bank of the Arkansas River." By agreement between the Pawnee Tribe and the United States, made November 23, 1892,[16] the Pawnee Tribe ceded and relinquished to the United States its beneficial interest in such reservation. Art. II of such agreement provided for the making of allotments to individual Pawnee Indians. Thereafter, on October 9, 1893, there was issued to Horace Field, a Pawnee Indian, a trust patent covering the following described lands: "The South East quarter of the [fol. 167] North West quarter, and the Lots numbered one, two and three of Section nineteen in Township twenty-three North of Range four East of the Indian Meridian, in Oklahoma Territory, containing one hundred and twenty-one acres and sixty-six hundredths of an acre." Title to that tract is now held by the United States in trust for four Indians to whom it passed by descent. On October 9, 1893, a trust patent was issued to William Bayhylle, a Pawnee Indian, covering the following described land: "The west half of the northeast quarter of section twenty and the southwest quarter of the southeast quarter and the lot numbered six of section seventeen in Township twenty-three north of Range four east of the Indian Meridian, Oklahoma Territory containing one hundred and twenty-nine acres." Title to that tract is now held by the United States in trust for eight Indians to whom it passed by descent. These two Pawnee allotments are also bounded by the Arkansas River.

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[13] Other townships, not here involved, were included in the reservation.

[14] 22 Stat. 603, 624.

[15] Many other tracts, not here involved, were also included.

[16] I. Kappler, Indian Affairs, Laws and Treaties, 496-498.

All four of the trust patents were issued under § 5 of the General Allotment Act of February 8, 1887,[17] and the trust period has been extended by Executive Orders as provided therein.

The portions of the river bed in suit were situated in Oklahoma Territory. The State of Oklahoma was admitted into the Union on November 16, 1907. All of the allotments were made prior to statehood.

On July 20, 1942, the State of Oklahoma executed two oil and gas leases in favor of Champlin Refining Company, covering the south half of the Arkansas River bed for a considerable distance, including the area of the river bed adjoining the four riparian tracts, and the Champlin Refining Company has drilled one well which is producing in commercial quantities.

On July 13, 1943, the United States commenced the instant action against the Champlin Refining Company, to enjoin it from trespassing upon the river bed and drilling for oil and gas thereunder, and for a decree canceling the lease and quieting the title in the United States, its allottees, and their heirs. The State of Oklahoma intervened in the action. [fol. 168] On September 16, 1944, a stipulation was entered into to the effect that it should be considered that the United States had introduced evidence showing the Arkansas River to be nonnavigable in fact at the location of the river bed in controversy on all dates material in this case.

The trial court found that the patents neither expressly included nor excluded the river bed and that the river, at all times material to the controversy, at the locations of the riparian tracts, was nonnavigable in fact.

In the case of State v. Nolegs, 40 Okl. 479, 139 P. 943, decided in 1914, the court took judicial notice of the fact that the Arkansas River was navigable, and held that the title of patentees to adjoining lands extended only to the high water mark of the stream. The land there involved was a homestead entry. The date of the patent is not disclosed.

The trial court held that the State had power to declare rivers navigable and to limit the title of riparian owners to

[17] 24 Stat. 388, 389.

the high water mark of the river, except where title to the river bed has been expressly granted by the United States prior to statehood, and that it was bound by the decision in State v. Nolegs, supra.

In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within a state passes to such state upon its admission into the Union, if the rivers are then navigable. If they are not then navigable, the title to the river beds, if a part of the public domain, remains in the United States. The question of navigability is determinative and is a Federal question.[18]

It is settled Federal law that streams or lakes which are navigable in fact are navigable in law and, conversely, if they are not navigable in fact, they are not navigable in law.[19]

Grants by the United States of its public lands bounded on streams or other waters, navigable, or nonnavigable, [fol. 169] made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. As regards such conveyances, the United States assumes the position of a private owner, subject to the general law of the state.[20] Where it is disposing of tribal lands of Indians under guardianship, the same rule applies.[21]

The question here presented is what title passed by the patents when they were issued in 1906 and 1907, prior to the admission of Oklahoma into the Union.[22]

Oklahoma could not adopt a retroactive rule for determining navigability which would destroy a title already accrued under Federal law and grant, or would enlarge what actually passed to Oklahoma at the time of her admission under the constitutional rule of equality.

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[18] United States v. Utah, 283 U. S. 64, 75;
United States v. Oregon, 295 U. S. 1, 14.

[19] United States v. Holt Bank, 270 U. S. 49, 56;
Oklahoma v. Texas, 258 U. S. 574, 586.

[20] Hardin v. Shedd, 190 U. S. 508, 519;
Hardin v. Jordan, 140 U. S. 371, 384;
Whitaker v. McBride, 197 U. S. 510, 512.

[21] Oklahoma v. Texas, 258 U. S. 574, 595.

[22] Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 87.

In Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 86, the court said:

"It is a natural inference that Congress in its grant to the Osage Indians in 1872 made it extend to the main channel of the river, only because it knew it was not navigable. This would be consistent with its general policy. Rev. Stats., § 2476; Oklahoma v. Texas, 258 U. S. 574; Scott v. Lattig, 227 U. S. 229, 242; Railroad Company v. Schurmeir, 7 Wall. 272, 289. If the Arkansas River is not navigable, then the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant expressly carry the title to that line.

"But it is said that the navigability of the Arkansas River is a local question to be settled by the legislature and the courts of Oklahoma, and that the Supreme Court of the State has held that at the very point here in dispute, the river is navigable. State v. Nolegs, 40 Okla. 479. A similar argument was made for the same purpose in Oklahoma v. Texas, supra, based on [fol. 170] a decision by the Supreme Court of Oklahoma as to the Red River. Hale v. Record, 44 Okla. 803. The controlling effect of the state court decision was there denied because the United States had not been there, as it was not here, a party to the case in the state court. Economy Light & Power Co. v. United States, 256 U. S. 113, 123. In such a case as this the navigability of the stream is not a local question for the state tribunals to settle. The question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made, and that was thirty-five years before Oklahoma was taken into the Union and before there were any local tribunals to decide any such questions. As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property

of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of the title. It is not for a State by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked. . . . .

"Some States have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on non-naviga- [fol. 171] bility of the stream in fact. In such a case, navigability *vel non* is not a local question."

At the time the grants were made, the common law was in effect in Oklahoma Territory.[23]

Under the rules of the common law, unless a contrary intention appears or is clearly inferable from the terms of the grant, the grantee of land, bounded by a nonnavigable stream or river, acquires title to the land to the center or thread of the water, on the theory that the grantor will not be presumed to have reserved a strip of land covered by water which will be of no practical value to him.[24]

In Oklahoma v. Texas, 258 U. S. 574, 595, 596, the patents to Indian allottees of the uplands adjoining the nonnavigable river contain no express inclusion or exclusion of the river bed. The Supreme Court held that, under the common law, the patents conveyed the title to the middle of the stream

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[23] St. 1893, § 3874; St. 1903, § 4200; Compiled Laws, 1909, § 5534; 12 Okl. St. Ann., § 2; Hoppe Hardware Co. v. Bain, 21 Okl. 177, 95 P. 765, 767; McKennon v. Winn, 1 Okl. 327, 33 P. 582, 584, 585.

[24] Oklahoma v. Texas, 258 U. S. 574, 595; United States v. Elliott, 10 Cir., 131 F. 2d 720, 723, and cases there cited; Note, 74 A. L. R. 599.

and rejected the contention that the common law rule had been impliedly abrogated in Oklahoma.

In United States v. Elliott, 10 Cir., 131 F. 2d 720, 723, the court said:

> "• • • At the time the United States made the grant to the Seneca and Shawnee Indians, the lands granted were not within a state or other local jurisdiction. The grant, therefore, was not subject to local law. It must be construed in accordance with the principles of the common law and the decisions of the United States Supreme Court. • • • Under the common law and decisions of the United States Supreme Court, a grant of land bounded on a nonnavigable river carries [fol. 172] the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river."

We conclude that when the trust patents were issued, they conveyed the title to the center of the Arkansas River and that the State of Oklahoma could not, by legislative fiat or judicial decision, take from the Indian allottees what the United States had conveyed to them before statehood.[25]

Wear v. Kansas, 245 U. S. 154, is heavily relied upon by the State and the Champlin Refining Company. An examination of the opinion in that case in the Supreme Court of Kansas, where it was entitled "State v. Akers,"[26] discloses that the court took judicial notice of the fact that the Arkansas River and the Kansas River were navigable in Kansas, and held that the test of navigability in law is navigability

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[25] See Coovert v. O'Connor (Pa.), 8 Watts, 470; Allen v. Weber, 80 Wis. 531, 50 N. W. 514.

In the last-mentioned case the court said:

> "The declaration made by the legislature of 1868, that Fox river is a navigable stream, could not possibly affect the rights of the owners of the dam, acquired long before, or make the dam navigable, or any other part of Fox river in any other sense than mere theory. The defendants' rights are fixed by their deeds, and that act certainly could not change them in the least."

[26] 92 Kan. 169, 140 P. 637.

in fact. All that the Supreme Court of the United States held in the Wear case was that it was not error for the Supreme Court of Kansas, under the circumstances there presented, to determine, by the process of judicial notice, that the rivers were navigable in fact. Here, the trial court, from the stipulated facts, found that the river was nonnavigable in fact. The Supreme Court of Oklahoma could not, by a judgment to which neither the United States nor the heirs of the Indian Allottees were parties, adjudge that the river was navigable and bind the United States and the heirs of Indian allottees by such adjudication.[27]

[fols. 173-176] The judgment is Reversed and the cause Remanded with instructions to enter a judgment as prayed for in the complaint of the United States.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

JUDGMENT

Fortieth Day, May Term, Monday, July 29th, A. D. 1946. Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable F. E. Kennamer, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with instructions to enter judgment as prayed for in the complaint of the United States of America.

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[27] See Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 87; Oklahoma v. Texas, 258 U. S. 574, 591.

[fol. 177] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR REHEARING—Filed August 17, 1946

Come now the appellees and respectfully move the Court that it grant a rehearing in this cause and as grounds therefor, allege and state, as follows:

The Court, in its opinion herein, did not rule upon or mention one of the principal defenses raised by the appel-
[fol. 178] lees in their answers filed in the court below, and such defense may not have been considered by this Court.

This defense is stated in the Amendment to the Intervening Answer of the State of Oklahoma as follows (R. 29):

> "For amendment to its intervening answer filed herein, the State of Oklahoma on relation of the Commissioners of the Land Office alleges that the United States Supreme Court has confirmed the right of the State of Kansas to declare the rivers within its borders as navigable rivers, and has confirmed the title of the State in and to the bed of such rivers.
>
> "The State of Kansas has declared the Arkansas River to be navigable within its boundaries and the title of the State of Kansas to the bed of such river has never been disputed because of the decision of the United States Supreme Court above mentioned, the bed of said river having been a portion of the public domain of the United States at the time of the admission of the State of Kansas into the Union.
>
> "The claim of the plaintiff that a different rule should be applied to that portion of the bed of the Arkansas River which was a part of the public domain of the United States within the boundaries of Oklahoma would be a denial to the State of Oklahoma and to this defendant of the equal protection of the laws in violation of the Constitution of the United States."

A similar answer was filed by the appellee, Champlin Refining Company (R. 28).

Evidence was introduced in support of the above quoted defense showing that the State of Kansas has asserted title to the bed of the Arkansas River for many years, that it has executed many oil and gas leases thereon, similar to
[fol. 179] the lease executed by the State of Oklahoma in

the present action, that its lessees have produced great quantities of oil from the bed of the Arkansas River and that the State of Kansas has received substantial royalties from such production, as well as from other uses, through the years.

The undisputed and inescapable fact is that the State of Kansas is enjoying and for many years has had, and profited by, the unrestricted ownership of the bed of the Arkansas River, whereas, the decision of this Court (under circumstances practically identical) would deny to the State of Oklahoma the same right.

The State of Oklahoma has entered this Court, clothed with all of the attributes of a sovereign state of the United States of America, and has duly and formally raised the defense in this action that the denial of such privilege conflicts with the Constitutional doctrine of equality of states. The Champlin Refining Company, a private citizen, has also raised the defense of the equal protection of the laws under the Federal Constitution.

Both appellees earnestly feel that they are entitled to an analysis of, and a ruling on this defense and we may state that, in the humble opinion of counsel, the question as to whether the State of Oklahoma will receive equal treatment with the State of Kansas, transcends other issues in this case.

In asking this Honorable Court to rule upon this defense, the appellees respectfully contend that the decision of this [fol. 180] Court deprives the State of Oklahoma and its interested citizens of equality with the State of Kansas for the reason that the United States Supreme Court in *Wear* v. *Kansas*, 245 U. S. 154, allowed the State of Kansas to appropriate the bed of the Kansas River under identical circumstances as those existing in the present case.

This Court has stated as the basis of its opinion in the case at bar:

> "We conclude that when the trust patents were issued, they conveyed the title to the center of the Arkansas River, and that the State of Oklahoma could not, by legislative fiat or judicial decision, take from the Indian allottees what the United States had conveyed to them before statehood."

In order to arrive at this conclusion of a United States *conveyance* of stream bed, it is, as we see it, quite necessary

by purely judicial construction to read into the government patents herein something that the Federal issuing officers did not see fit to put in them, namely the right to additional lands in the stream bed. It should be borne in mind that prior governmental surveys "meandered" the stream bed on the official plats and caused fractional subdivisions and quarter sections adjacent and abutting the river to be called "Lots," and the survey showed deductions of acreage therefrom on account of its being beyond the south bank and in the stream bed. So show the official governmental surveys.

Seeking a rule of interpretation of Federal patents disposing of riparian lands, we find, in *Oklahoma* v. *Texas*, 258 U. S. 574 at Pages 594-595, the following:

> [fol. 181] "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. *If by* a treaty or statute or *the terms of its patent* it is shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. Where it is disposing of tribal land of Indians under its guardianship, the same rules apply" (Emphasis ours).

In this connection it is remembered that in *Oklahoma* v. *Texas, the entire stream bed* of the Red River belonged to the United States, which saw fit, however, to specify precisely "the mid-channel" or the "middle of the main channel" of the river (Pages 592-593). Thus the riparian claims for territory beyond the *stated boundaries* of the tract fell, in the *Oklahoma-Texas case*, as we think they should fall here. There was no question about the government's grantees being held to the strict wording of the area description and said opinion goes on to hold that "the southerly half of the (Red River) bed had not been included in the reservation or the Big Pasture, and was not subjected

to the operation of the Act of 1900, or that of 1906." And then occurs this significant language: "*This shows that the United States intended to retain* that part of the bed." By the same rule the same failure to mention or include the [fol. 182] river bed in the instant cases, should provoke a similar conclusion here.

We would be the first to concede that if the United States had actually conveyed the river bed to these Indian allottees before statehood, the State of Oklahoma could not by legislative fiat, judicial decision or any other means take the river bed from them, *but the Supreme Court of the United States, in Wear* v. *Kansas, expressly held that a similar patent did not convey any portion of the river bed to the Indian allottee.*

Every material fact involved in the issuance of the patent in Wear v. *Kansas is identical with the facts relied upon by appellants in the case at bar.* To this is added the important circumstance that whereas there was no law in existence which declared the Arkansas river non-navigable at the time the riparian owners in the case at bar received their patents, there was a Territorial law declaring the Kansas River to be non-navigable at the time the riparian owner in *Wear* v. *Kansas* received his patent.

It is true that the patents in the case at bar were issued before statehood. So was the patent in *Wear* v. *Kansas.*

It is true that the patents in the case at bar were issued to the Indian wards of the government. So was the patent in *Wear* v. *Kansas.*

It is true that at the time the patents were issued in the case at bar, the common law was in effect in the Oklahoma Territory. The common law was likewise in effect in the [fol. 183] *Kansas Territory at the time the patent was issued in Wear* v. *Kansas.*

It is true that the Arkansas River in the case at bar does not meet the Federal test of navigability. Neither did the Kansas River meet the Federal test in *Wear* v. *Kansas.*

The riparian owners in the present case have asked this Court to hold that the common law in effect in Oklahoma Territory governed their riparian rights and extended their ownership to the center of the Arkansas River, and this Court has so held. The riparian owners in *Wear* v. *Kansas* requested the Supreme Court of the United States to hold that the common law in effect in the Kansas Territory governed their riparian rights and extended their

ownership to the center of the Kansas River, but the Supreme Court refused to so hold, and on the contrary, expressly held that the riparian owner's patent, at the time of its issuance, gave him no right whatsoever in the river bed.

The Supreme Court, in rejecting the contention that the common law governed the patentee's riparian rights, stated:

"In this aspect it is a question of *State law.*"

(Emphasis will be ours throughout unless otherwise noted.)

The Supreme Court then applied the State law which, as in the case at bar, was the exact contrary of the common law of the Territory, and held that the State law deprived the riparian owners of any rights in and to the river bed.

[fol. 184] The appelle-s in the present case earnestly feel that under their plea of Constitutional equality, they are entitled to a ruling showing why this Court should declare that the riparian rights of the patentees of riparian lots in Oklahoma should be governed by Territorial law, when the Supreme Court of the United States has declared that the riparian rights of riparian owners in Kansas are to be governed by the State law.

Furthermore, the navigability of a river must be determined by law, and there was no law in existence which declared the Arkansas River to be non-navigable at the time *the patentees in the case at bar* received their patents, whereas, as above noted, the Territorial Legislature of Kansas had declared the Kansas River to be non-navigable at the time the patentee received his patent in *Wear* v. *Kansas.*

The appellees earnestly feel that under their plea of Constitutional equality, they are entitled to a ruling showing why this Court should cast aside the Oklahoma State rule of navigability in favor of a contrary Federal finding made almost thirty years after the issuance of the patents in question, whereas the Supreme Court of the United States upheld the Kansas State law of navigability over and above a contrary Territorial finding which was in effect at the time of issuance of the patents in the *Wear* v. *Kansas case.*

This Court distinguished *Wear* v. *Kansas* by saying that in the case at bar, the trial court found the river to be

[fol. 185] non-navigable (although the trial court went on to hold that, notwithstanding such finding, the question was one of "State law").

Does this mean that each riparian owner along the banks of the Arkansas River in Kansas may take his case into a Federal court in that State, and if that court finds that the river is non-navigable in fact, establish title to the river bed and thus upset the title of the State?

We respectfully submit that there could be no other conclusion. The common law was in effect in the Kansas Territory just as it was in the Oklahoma Territory, and if a Federal court in Oklahoma can at this late date invoke the common law of the Territory and thereby include lands beyond what was described, merely by finding that the river is not actually navigable, then the Constitutional provision of equality would demand that the Federal courts of Kansas invoke the Territorial law of Kansas whenever they found a river in that State to be non-navigable in fact.

Contrary to the above doctrine, however, the Supreme Court of the United States, in upholding the State rule of property in *Wear* v. *Kansas*, declared that "the fact (of ownership of the river bed) is of a kind that should be established once and for all, *not perpetually retried.*"

The appellees in the present case earnestly feel that, under their plea of Constitutional equality, they are entitled to a ruling, showing why, in Oklahoma, the State's rule of property which it asserted in *State* v. *Nolegs* is to be "retried" in the case at bar, when the Supreme Court [fol. 186] of the United States confirmed "once and for all" the Kansas rule of property asserted by that State in *State* v. *Akers.*

We most sincerely contend that the appellees' plea of Constitutional equality cannot be correctly decided without taking into account the actual conditions existing in the respective States of Oklahoma and Kansas, and the practical result of the Court's decision.

Neither the Arkansas River nor the Kansas River will sustain navigation and everyone knows it. The Kansas Supreme Court knew it, for it said with respect to the Arkansas River:

> "It is not pretended that the river is now navigable in fact in Kansas, and the court, as well as everybody

else knows that it is not. But does this conclude the matter?"

Hurst v. *Dana*, 86 Kan. 947, 112 Pac. 1042.

With respect to the Kansas River the court said:

"For a generation or more land transportation has so far superseded the use of water craft in this region that even the Missouri, a stream known to be navigable in fact and in law, has ceased to float upon its waters along the boundary of this state any appreciable commerce of the country, *and the Kansas, which we have judicially noticed as navigable* (*Wood* v. *Fowler*, 26 Kan. 682, 40 Am. Rep. 330) *floats none at all.*"

Hurst v. *Dana*, 86 Kan. 947, 122 Pac. 1043.

The Supreme Court of the United States knew it, because when that Court upheld *Wear* v. *Kansas* in its opinion in [fol. 187] *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 71, it said:

"Some States have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control."

The inescapable and universally accepted fact is that both rivers are non-navigable under the Federal test of navigability. The State of Kansas nevertheless enjoys the ownership of the beds of both rivers, whereas the State of Oklahoma as to the Arkansas River, is denied such ownership.

We also contend, most earnestly, that in deciding a question as delicate and as extremely important as that of equality between two sovereign states, the law must be taken as it is actually practiced and followed, and as settled and sanctioned by long-standing decision of the highest court in this Union. The decision in *Wear* v. *Kansas* has been taken in Kansas to mean that the title to the bed of the Kansas River is established in the State, and the decision is of such prestige within the State, that the State's assertation of title to the bed of the Arkansas River has not even been challenged.

This is a practical world filled with practical people and legal theory cannot change the practical result that Kansas

has been granted the sovereignty over, and ownership of the beds of all rivers within the State which were not expressly conveyed before statehood, whereas this same important [fol. 188] privilege is about to be by this decision denied to the State of Oklahoma.

The appellees further call to the attention of the Court the fact that two companion cases are now before the Supreme Court of Oklahoma. These cases (entitled *State of Oklahoma et al.* v. *Oldham*, No. 32629; and *State of Oklahoma et al.* v. *Aladdin Petroleum Co.*, No. 32625), were brought by the State of Oklahoma and its oil lessee, the Champlin Refining Co., against the owners of the riparian lots on the Arkansas River adjacent to that portion of the river bed which has been developed for oil under the lease held by the Champlin Refining Company. These cases involve the same river, the same general treaties, and the same oil lease, but different riparian lots and different sectors of the river bed than in the case at bar.

The trial court, in those cases, decided that it was bound by the rule of property announced by the State Supreme Court in *State* v. *Nolegs*, and rendered judgment for the State and against the riparian owners.

The State of Oklahoma earnestly feels that if this weighty issue is to be properly settled and determined by the Supreme Court of the United States, that Court should have the benefit of the holding of the State courts, as well as of the Federal courts, in these cases. For this reason, the appellees respectfully ask that this Court withhold its decision upon this petition for rehearing until a decision has been rendered by the Oklahoma Supreme Court upon the cases above described. For grounds of this request the [fol. 189] appellees respectfully cite the case of *City of Chicago* v. *Fieldcrest Dairy*, 316 U. S. 172, in which the United States Supreme Court invoked the doctrine of *Erie* v. *Tompkins*, and directed the Circuit Court of Appeals for the Seventh Circuit to withhold its opinion until the State court had acted upon a similar question.

The appellees further respectfully call the Court's attention to the statement on Page 6 of the opinion as follows:

> "On September 16, 1944, a stipulation was entered into to the effect that it should be considered that the United States had introduced evidence showing the Arkansas River to be non-navigable in fact at the

location of the river bed in controversy on all dates material in this case.

"The trial court found that the patents neither expressly included nor excluded the river bed and that the river, at all times material to the controversy, at the locations of the riparian tracts, was non-navigable in fact."

Also to the statement on Page 11 of the opinion as follows:

"Here, the trial court, *from the stipulated facts*, found that the river was non-navigable in fact."

These two statements when read together would leave the impression that the appellees stipulated that the river was non-navigable in fact. Nothing could be farther from the appellees' view of what was *actually stipulated*. The purpose of the stipulation was merely to agree that the Government's witnesses would testify that the river was non-navigable, in order to save the time and expense of lengthy testimony on an issue which the State regarded as imma-
[fol. 190] terial. The stipulation went on to say (although the opinion of the Court does not mention it) that the State objected to such testimony as immaterial and irrelevant, inasmuch as the State Supreme Court had already determined the question of navigability. The State, as a matter of fact, introduced the *Nolegs* decision as its evidence in this case, showing that the Supreme Court of Oklahoma had determined the river to be navigable.

The trial court, therefore, had before it the evidence of the State, showing the river to be navigable, and the offered evidence of the Government to the effect that the river was non-navigable.

The trial court held, correctly as we believe, that it was bound by the State's declaration of navigability, and that its own statements as to non-navigability and/or comment thereon was immaterial, since it had no jurisdiction to make such finding.

We earnestly request the Court to review the language of the opinion with reference to the stipulation so that it will clearly show that the State made no stipulation that the river was non-navigable in fact, as we earnestly desire to distinguish between an agreement that certain testimony may be introduced, and the resulting (and we think

erroneous) conclusion that such testimony, even in the face of the *Nolegs* doctrine, becomes the binding view and finding of the trial court.

Wherefore, appellees respectfully ask that they be granted a rehearing in this cause, that upon such rehearing [fol. 191] this Court decide that under the Constitutional doctrine of equality, the State law in Oklahoma shall govern the riparian rights of the riparian owners in this case, just as the State law was allowed to govern the riparian rights of similar owners in the State of Kansas; that as to this question of State law, the Federal courts are bound, under the decision of the Supreme Court of the United States in *Erie* v. *Tompkins*, 304 U. S. 64-79, as construed in *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 106, to render the same judgment which the State court would have rendered if it were deciding the case, and that, since the Oklahoma Supreme Court has declared in *State* v. *Nolegs* that the Arkansas River is navigable throughout its entire length within the State, the patentees in the case at bar are without title or ownership of the bed of the Arkansas River at the locations involved in this action.

Respectfully submitted, Mac Q. Williamson, Attorney General; J. Walker Field, Assistant Attorney General; Walter Marlin, Law and Executive Counsel for The Commissioners of the Land Office of the State of Oklahoma; Harry O. Glasser, Nathan Scarritt, E. S. Champlin, Attorneys for Champlin Refining Company.

August, 1946.

[fol. 192] CERTIFICATE

I, Mac Q. Williamson, Attorney General of Oklahoma, and of counsel for appellees herein, do hereby certify that I am familiar with the contents of the above and foregoing petition for rehearing; that I verily believe that said petition is meritorious and is not vexatious and is not filed for purposes of delay, but in order that substantial justice may be had and done.

(Signed) Mac Q. Williamson, Attorney General of the State of Oklahoma, Of Counsel of Appellees.

Oklahoma City, Oklahoma, August 10, 1946.

[File endorsement omitted.]

[fols. 193-194] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING

Fifty-fifth Day, May Term, Thursday, August 29th, A. D. 1946

Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Franklin E. Kennamer, District Judge

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

(On September 10, 1946, an order was entered staying the issuance of the mandate for sixty days from that day.)

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 195] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 715

ORDER ALLOWING CERTIORARI—Filed January 20, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Mac Q. Williamson. File No. 51,579. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 715. State of Oklahoma and Champlin Refining Company, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed November 25, 1946. Term No. 715 O. T. 1946.